Supreme Court, U.S.
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Case No.

IN THE

Supreme Court of the United States

MADELINE M. LAMBERT,
Petitioner,

vs.

CHARLES J. CRIST, JR.,
as Attorney-General, State of Florida,
ROSENA FINKLEA, YVETTE MacMILLAN,
ROBERT DIETZ, and RICHARD MOORE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review

On January 2, 2005, respondent Moore of the Florida Highway Patrol ("FHP") seized Lambert's car, pursuant to the Florida Contraband Forfeiture Act ("FCFA"), after arresting her brother for driving the car while under the influence of alcohol and for driving with a suspended license (Lambert was not in the car). The next day, FHP released the car to her after she went to the impound yard and paid the towing charge.

Ten days later, Moore stopped Lambert as she was driving off her property and onto a public highway. Moore told her it had been released by mistake, and then he re-seized it. At a hearing, Moore testified that FHP's in-house counsel (*i.e.*, respondent Finklea) told him to stop the car under the pretext of a traffic violation and re-seize it. The court ruled FHP failed to establish probable cause for the initial seizure and ordered FHP to return the car to Lambert; however, FHP did not do so for almost a year.

When the car was finally returned, the Florida court ordered the state to pay Lambert certain actual damages for the seizure. Lambert then sued these defendants for violating her civil rights; however, the Federal District court denied her claims, saying the damage award meant she already had her day in court.

This case involves issues of first impression among cases dealing with the re-seizure of property, because in this case **the re-seizure was done without a warrant or exigent circumstances.** Consequently, there are three questions presented for review:

1. Is probable cause transferable from one seizure to another?

2. Does the release of seized property from police custody purge it from being tainted as forfeitable contraband?

3. Does a hearing under FCFA preclude a claim under 42 U.S.C. §1983?

List of Parties

The petitioner, Madeline Lambert, was the plaintiff in the lower-court proceedings of this case and the apellant before the United States Court of Appeals for the Eleventh Circuit.

The respondents are:

Richard Moore, who is a state trooper with FHP;

Rosena Finklea is FHP's assistant general counsel on forfeiture matters;

Yvette MacMillan is an assistant attorney-general for the state of Florida, who represented FHP in the forfeiture action described herein;

Robert Dietz is an assistant attorney-general for the state of Florida, who assisted MacMillan in the forfeiture action described herein;

Charles J. Crist, Jr. was the Attorney-General (now Governor) of Florida, whose department represented FHP in the forfeiture action described herein

Corporate disclosure statement and Certificate of interested persons

The petitioner is not incorporated, and therefore she has no parent corporation of which to disclose ownership.

Besides herself, the only interested parties to this appeal of which the petitioner is aware are: the District Court judge, the Hon. James S. Moody, Jr.; the judges on the Eleventh Circuit Court of Appeals, the Hon. R. Lanier Anderson, III, the Hon. Susan H. Black, and the Hon. Rosemary Barkett; the appellees' counsel, Thomas Gonzalez, Esq.; and the appellees themselves, Charles J. Crist, Jr., Governor, State of Florida, Rosena Finklea, Yvette Macmillan, Robert Dietz, and Richard Moore.

Table of Contents

Questions Presented i

List of Parties ii

Corporate Disclosure Statement ii

Table of Contents iii

Table of Citations iv

Table of Appendices vii

Opinion Below viii

Statement of Jurisdiction viii

Statement of the case 1

Summary of the Argument 3

Argument 4

1. Probable cause is not transferable from one seizure to another 4
2. The car's release purged it of being tainted as forfeitable contraband 7
3. FCFA does not preempt 42 U.S.C. §1983 9

Conclusion 11

Table of Citations

Cases — Page

Buzzi v. Gomez, 24 F.Supp.2d 1352 (S.D. Fla.1998) 10

Chuck v. Homestead Police Dept., 888 So.2d 736 (Fla. 3rd D.C.A. 2004) 5

Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971) 6

Davis v. Gracey, 111 F.3d 1472 (10th Cir., 1997) 10

Dept. of Law Enforcement v. Real Property, 588 So.2d 957 (Fla. 1991) 5

Florida v. White, 526 U.S. 559, 119 S.Ct.1555 (1999) 5, 8, 9

G.M. Leasing Corp. v. United States, 429 U.S. 338, 97 S.Ct. 619 (1977) 6

Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727 (1982) 10

Kalina v. Fletcher, 522 U.S. 118, 118 S.Ct. 502 (1997) 10

Murray v. U.S., 487 U.S. 533, 108 S.Ct. 2529 (1988) 6, 7, 8

O'Neill v. Krzeminski, 839 F.2d 9 (2nd Cir. 1988) 10

Segura v. U.S., 468 U.S. 796, 104 S.Ct. 3380 (1984) 11

Swint v. City of Wadley, Ala., 5 F.3d 1435 (11th Cir. 1993) 6

Swope v. Krischer, 783 So.2d 1164 (Fla. 2nd D.C.A. 2001) ... 10

U.S. ex rel. Cabrera v. Page, 172 F.Supp. 966 (N.D.Ill. 2001) 6

U.S. v. Fuller, 374 F.3d 617 (8th Cir. 2004) 6

U.S. v. Herrera Martinez, 354 F.3d 932 (8th Cir. 2004) 5

U.S. v. Magluta, 418 F.3d 932 (11th Cir. 2005) 6

U.S. v. Rivers, 121 F.3d 1043 (7th Cir. 1997) 6

U.S. v. Silvestri, 787 F.2d 736 (1st Cir. 1986) 5, 6, 7

U.S. v. Williams, 177 Fed.Appx. 914 (11th Cir. 2006) 7

White v. Florida, 680 So.2d 550 (Fla. 1st D.C.A. 1996) 6

White v. Florida, 710 So.2d 949 (Fla. 1998) 8

Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338 (1979) 6, 9

Statutes

§932.701, *et seq.*, Fla. Stat. ("FCFA) ..... vii, 1, 13

§932.703, Fla. Stat. 1, 9, 10

§932.703(2)(a), Fla. Stat. 4, 5

§932.703(5), Fla. Stat. 4

§932.704(1), Fla. Stat. 2, 5

28 U.S.C. §1254(1) viii

42 U.S.C. §1983 ..... i, 2, 3, 9, 10, 11

TABLE OF APPENDICES

A. Order of the United States District Court for the Middle District of Florida, dated and filed August 16, 2006 12

B. Opinion of the United States Court of Appeals for the Eleventh Circuit, entered March 12, 2007 34

C. Mandate of the United States Court of Appeals for the Eleventh Circuit, entered April 10, 2007 36

D. Order of Dismissal from the United States District Court for the Middle District of Florida, entered on May 15, 2007...38

E. §932.701, Fla. Stat. 40

F. §932.703, Fla. Stat. 44

G. §932.704, Fla. Stat. 50

Opinion Below

On March 12, 2007, the United States Court of Appeals for the Eleventh Circuit issued its opinion affirming the District Court's opinion (see slip opinion in the appendix).

Statement of Jurisdiction

The petitioner seeks review of the order and judgment issued on March 12, 2007 by the United States Court of Appeals for the Eleventh Circuit, pursuant to the certiorari jurisdiction conferred on this court by 28 U.S.C. §1254(1).

Statement of the Case

On January 2, 2005, appellee Moore of the Florida Highway Patrol ("FHP") arrested Lambert's brother for driving her car under the influence of alcohol and with a suspended license (Lambert wasn't in the car). Moore seized the car pursuant to §932.701, *et seq.* (*i.e.*, the Florida Contraband Forfeiture Act, or "FCFA"), and towed it to an FHP impound yard. The next day, Lambert went to the yard and paid the towing charge to release her car. On January 12, 2005, Moore was waiting for Lambert to drive off her property and onto a public highway. When she did, he stopped her car, told her it had been released by mistake, and then re-seized it.

On February 1, 2005, an adversarial preliminary hearing was held, as required by §932.703, Fla. Stat. Moore testified as to the events surrounding the car's initial seizure and re-seizure, saying FHP's in-house counsel (*i.e.*, appellee Finklea) told him to stop the car under the **false** pretext of a traffic violation and re-seize it. Circuit Court Judge Gilner said "FHP failed to establish probable cause for the initial seizure because no evidence of any kind was presented to show [Lambert] knew or should have known the driver was using her car for an illegal purpose." Accordingly, he ordered FHP to release the car.

FHP did not release the car, but made two unsuccessful motions to stay the order, before appealing. On November 16, 2005, the Florida Second District Court of Appeal unanimously upheld Judge Gilner's ruling and ordered FHP to release the car and pay Lambert's costs and attorney's fees. On February 13, 2006, Judge Dubensky (Gilner's successor) awarded her certain damages and attorney's fees.[1]

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1 His order said the forfeiture action was "a gross abuse of agency discretion," the state's "ceaseless litigation [was] not conducted in good faith," its claims were "baseless," and its appeal was a "sham."

Lambert then brought the underlying civil rights action in state court[2], claiming the car's re-seizure and continued impoundment throughout the forfeiture action violated her Fourth Amendment right to be free from unreasonable searches and seizures, her Fifth and Fourteenth Amendment due-process rights, her corresponding rights under Article I, Secs. 9 & 12 of the Florida Constitution, and the public policy in §932.704(1), Fla. Stat. She sought damages for economic and physical hardship, lost income, aggravation of physical injuries, and emotional distress[3].

The appellees filed a motion to dismiss all of Lambert's claims, arguing she failed to state a claim for relief, based on the following grounds: (1) Moore and Finklea were entitled to qualified immunity for the seizure of her vehicle; (2) MacMillan and Dietz were entitled to absolute immunity for prosecuting the forfeiture action; (3) Crist could not be held liable as a supervisor under 42 U.S.C. §1983; (4) due process was not violated; and (5) FCFA does not create a private cause of action. On August 16, 2006, the motion was granted and Lambert filed an appeal, claiming the District Court erred in formulating or applying several rules of law. On March 12, 2007, the United States Court of Appeals for the Eleventh Circuit issued its opinion affirming the District Court's opinion. In so doing, the Court of Appeals adopted the District Court's reasoning.

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2 The appellees removed the action to the Federal District Court for the Middle District of Florida.

3 Judge Dubensky's order also said the forfeiture action caused Lambert "unnecessary legal expenses, costs, delay, and undue hardship."

Summary of the Argument

Both the District Court and the Court of Appeals committed clear error in saying Moore and Finklea acted within their discretion in re-seizing Lambert's car without a warrant. The basis for these rulings was that FCFA permits delayed seizures; however, this provision is not intended to let prosecutors seize property at their discretion. Instead, this provision allows for a delayed seizure **only** when the property cannot be seized immediately after establishing probable cause. Also, Moore's using the false pretext of a traffic stop to re-seize her car was a blatant violation of both FCFA and the Fourth Amendment. Finally, releasing her car meant the re-seizure was a new seizure, thus requiring Moore to have a warrant – and one with probable cause based on new or different facts.

Releasing the car also meant it was no longer forfeitable contraband, because this act interrupted the initial seizure. The District Court based its reasoning on a United States Supreme Court decision upholding a warrantless car seizure delayed by months after establishing probable cause; however, the Court said that decision was not to be considered as justification for the warrantless seizure of anything a state calls contraband. The District Court's and the Court of Appeals' argument means the car could have been released and re-seized *ad infinitum*, which would be akin to an open-ended search warrant.

The District Court and the Court of Appeals also erred in saying Lambert's civil rights action was barred because FCFA provides a post-deprivation remedy. That remedy pertained to the initial seizure of her car, while her civil rights action pertained to the car's re-seizure – and to different defendants. In effect, those courts said FCFA precludes civil rights actions regarding forfeitures, yet the purpose of 42 U.S.C. §1983 is to create a damages remedy against every state official for violating any person's constitutional or statutory rights.

Argument

Lambert alleged FHP seized her car pursuant to FCFA and released it to her the next day, only to have Moore stop it ten days later under a false pretext and re-seize it for the same offense – and without a warrant. FHP kept the car impounded for almost a year (in defiance of *three* court orders) until finally losing a sham appeal. Accordingly, her claims were based on the car's re-seizure being a clear and deliberate violation of her Fourth Amendment and due-process rights.

In dismissing her complaint, the District Court said Moore and Finklea acted within their discretion because both FCFA and the United States Supreme Court say a car can be seized subsequent to the violation. Since all of her claims were based on the re-seizure being unconstitutional, this ruling was fatal to those claims; however, this ruling was clear error, as were the court's rulings that the car was still forfeitable contraband and Lambert had her day in court under FCFA.

1. Probable cause is not transferable from seizure to seizure

The District Court said Moore didn't need a warrant to re-seize the car because §932.703(2)(a), Fla. Stat. allows for seizing personal property subsequent to the violation. In so ruling, the court overlooked the obvious intent of this provision, which is to allow for a delayed seizure of property *only* in specific circumstances where it could not be immediately seized at the time probable cause was established[4]; the intent is not to

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4 When the property "cannot be located; has been transferred to, sold to, or deposited with, a third party; has been placed beyond the jurisdiction of the court; has been substantially diminished in value by any act or omission of the person in possession of the property; or has been co-mingled with any property which cannot be divided without difficulty." §932.703(5), Fla. Stat.

provide prosecutors with justification for re-seizing property at their discretion.[5] *Accord, Florida v. White*, 526 U.S. 559, 571, 119 S.Ct.1555, 1562 (1999)(Stevens, J., dissenting)(belated seizure may involve a serious intrusion on rights of innocent persons with no connection to the earlier offense). At best, this statute is ambiguous, and FCFA is to be strictly construed against any loss and in favor of an owner's retention of property. *Chuck v. Homestead Police Dept.*, 888 So.2d 736, 744 (Fla. 3rd D.C.A. 2004) and *Dept. of Law Enforcement v. Real Property*, 588 So.2d 957, 961 (Fla. 1991).

The District Court also overlooked the fact that §932.703(2)(a), Fla. Stat. is *itself* restricted by §932.704(1), Fla. Stat., which prohibits using FCFA to seize property under a false pretext. This statute alone should have made Finklea and Moore realize their actions were clearly wrong, especially since a pretextual traffic stop violates the Fourth Amendment. *U.S. v. Herrera Martinez*, 354 F.3d 932, 934 (8th Cir. 2004). The appellees claimed FHP didn't need a warrant to re-seize the car because "the initial seizure of [the car] controls the analysis of this case," and therefore the re-seizure could be based on the same probable cause. However, if FHP didn't need a warrant, then why did Finklea order Moore to seize the car under the false pretext of a traffic stop?

Releasing the car to Lambert interrupted the initial seizure, which meant the re-seizure was a *separate* seizure. *See, U.S. v. Silvestri*, 787 F.2d 736, 740 (1st Cir. 1986). As a separate seizure, FHP needed a warrant supported by sufficient

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5 The appellees said "because DUI subjects a person's vehicle to seizure under the FCFA, Finklea made the *discretionary* decision to advise Moore to take back the vehicle so that the FHP could proceed with forfeiture proceedings (emphasis added)." In other words, at their whim.

probable cause. *Coolidge v. New Hampshire*, 403 U.S. 443, 481, 91 S.Ct. 2022, 2044 (1971), *U.S. v. Fuller*, 374 F.3d 617, 621 (8th Cir. 2004), and *see, U.S. v. Magluta*, 418 F.3d 1166, 1182 (11th Cir. 2005). This probable cause had to be based on *new* or *different* facts from those supporting the initial seizure. *See, Silvestri, supra*, and *Murray v. U.S.*, 487 U.S. 533, 539, 108 S.Ct. 2529, 2534 (1988)(re-seizure requires independent basis). Furthermore, probable cause to seize should not be transferable from one seizure to another, just as probable cause to search is not transferable from one person to another. *See, Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S.Ct. 338, 342 (1979), *U.S. ex rel. Cabrera v. Page*, 172 F.Supp. 966, 979 (N.D.Ill. 2001), *U.S. v. Rivers*, 121 F.3d 1043, 1045 (7th Cir. 1997), and *Swint v. City of Wadley, Ala.*, 5 F.3d 1435, 1444 (11th Cir. 1993). Even if the same probable cause could justify both seizures, that fact would still not justify Moore's and Finklea's failure to obtain a warrant before re-seizing the car.

In *White v. Florida*, 680 So.2d 550 (Fla. 1st D.C.A. 1996), Judge Wolf's dissent made a highly relevant observation about the durability of probable cause for seizing a car, in questioning whether exigent circumstances could continue for several months once probable cause had been established. He noted that cases upholding the warrantless seizure of a car parked on a public street failed to recognize the factual situation of the decision on which they were based (*i.e.*, *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 97 S.Ct. 619 (1977)):

> "That case involved a seizure of an automobile in order to satisfy a tax debt to the United States, a situation which is similar to a private repossession of an automobile to satisfy a debt. The language in this opinion concerning expectation of privacy on a public street must be read in context of the facts of the case. A person who is in default on a debt or who is subject to a judgment lien does not have a reasonable expectation

> that his property will not be repossessed on a public street. On the other hand, a person has a reasonable expectation that if the government is seizing his property other than for purposes of satisfying a debt, a warrant will be secured. *It is difficult to respond to the argument concerning the theory that if you once believed that the car contained drugs, you may forever seize the car based on exigent circumstances. This theory fails to recognize that both probable cause and exigent circumstances become stale and will no longer support the legality of a later seizure* (emphasis added)." *Id.*, at 559.

The 11th Circuit Court of Appeals apparently agrees, since it has said staleness must be decided on the particular facts of each case, and the probable cause for an isolated violation quickly dwindles as time passes. *U.S. v. Williams*, 177 Fed.Appx. 914, 921 (11th Cir. 2006).

2. The car's release purged it of being tainted as forfeitable contraband.

Releasing Lambert's car to her[6] purged it of being tainted as forfeitable contraband, because, as mentioned, doing so interrupted the seizure, thereby making the re-seizure a separate seizure. *Murray, supra* and *Silvestri, supra*. The car's losing this status is significant because the District Court said

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6 FHP claimed the car's release was a mistake, without explaining why this fact was relevant; however, Lambert claimed releasing the car to her – regardless of why – made re-seizing it a *separate* seizure. *See, Silvestri, supra*.

it was still forfeitable contraband and therefore it could be re-seized without a warrant. In support, the District Court cited *Florida v. White, supra*, which said a car could be seized without a warrant several months after probable cause for the seizure arose, because the seizure took place on a public highway and the car itself was contraband. *Id.*, 526 U.S. at 565, 119 S.Ct. at 1559. However, the District Court overlooked an important qualification the Supreme Court made about this decision, saying its ruling was "not a general endorsement of the warrantless seizure of anything a state chooses to call "contraband," regardless of whether the property is in public when seized." *Id.*, at 1560 (Souter and Breyer, JJ, concurring).

Releasing the car meant it could be "cleanly" re-seized, if FHP had a warrant – and one with probable cause based on *new* or *different* facts from those supporting the initial seizure. *See, Murray*, 487 U.S. at 541-42, 108 S.Ct. 2535 (re-seizure requires independent basis). In *White v. Florida*, 710 So.2d 949 (Fla. 1998), the case overruled by *Florida v. White, supra*, the Florida Supreme Court explained why a warrant would be required for a delayed seizure:

> "A citizen's property is protected by the federal and Florida constitutions against warrantless seizure even when the seizure is done pursuant to a statutory scheme for forfeiture." *Id.*, at 950. "In carrying out a statutorily-authorized seizure, agents of the attorney general must also obey the Constitution, particularly the Fourth Amendment's command that there be no unreasonable searches and seizures." *Id.*, at 952. "The government may not act at any time, anywhere, and regardless of the existence of exigent circumstances, *or a change in ownership or possession,* to seize a citizen's property once believed to have been used in

> illegal activity, without securing the authorization of a neutral magistrate (emphasis added)." *Id.* "This is especially true when the entire focus of the seizure was to seize the property itself as a prize because of its alleged prior use in illegal activities, rather than to search the property for contraband known to be therein and that might be lost if not seized immediately." *Id.*, at 954.

Even though this decision was overruled, this reasoning wasn't, and so it still applies to property which is not itself forfeitable contraband. *See, Florida v. White*, 526 U.S. at 565, 119 S.Ct. at 1559. The logical extension of arguing Lambert's car was still forfeitable contraband means it could have been released by mistake (or for any other reason) an unlimited number of times and re-seized each time at the whim of law enforcement. This situation would be substantially similar to an "open-ended" or general search warrant, which the Supreme Court has prohibited. *See, Ybarra v. Illinois, supra*, 444 U.S. at 92, 100 S.Ct. at 343, n.4 (1979).

3. FCFA does not preempt 42 U.S.C. §1983.

The District Court also erred in saying Lambert's Fourth Amendment and due-process rights were not violated because the Florida Supreme Court has said FCFA's litigation process is constitutional and gave her a post-deprivation remedy. Furthermore, since the trial and appellate courts ruled in her favor, she had her day in court. This argument overlooks the fact that the appellees were not parties to the forfeiture action – and Lambert has yet to have her day in court against them. This argument also misses the focus of FCFA's litigation process, which is on the *initial* seizure. *See*, §§932.703 & 932.704, Fla. Stat. However, as mentioned, all of Lambert's claims were based on the *re-seizure* and its resulting continued impoundment.

The District Court said MacMillan, Dietz, and Crist enjoyed absolute immunity because their actions were connected to their roles as prosecutors, and because Crist had no legal duty to intervene in forfeiture proceedings. Actually, they were entitled to only *qualified* immunity, which could be overcome by showing their conduct violated clearly-established statutory or Constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982) and *Swope v. Krischer*, 783 So.2d 1164, 1169 (Fla. 2nd D.C.A. 2001). The claims against MacMillan and Dietz were for tacit collaboration in the re-seizure, which is a valid cause of action against a law-enforcement officer who has acquiesced in the violation of someone's Constitutional rights by another officer. *See, O'Neill v. Krzeminski*, 839 F.2d 9, 12 (2nd Cir. 1988) and *Davis v. Gracey*, 111 F.3d 1472, 1477 (10th Cir. 1997). Likewise, the claim against Crist for deliberate indifference is also a valid cause of action against a supervisor who fails to intervene after learning a subordinate has violated someone's civil rights. *See, Buzzi v. Gomez*, 24 F.Supp. 2d 1352, 1362 (S.D. Fla. 1998).

The District Court's argument means no issues concerning a forfeiture can be dealt with outside of FCFA's litigation process[7], and therefore a civil rights action pertaining to the forfeiture must be heard at the adversarial preliminary hearing under §932.703, Fla. Stat. This argument overlooks the purpose of 42 U.S.C. §1983, which is to create a damages remedy against every state official for violating any person's constitutional or statutory rights. *Kalina v. Fletcher*, 522 U.S.

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7 The District Court said that, under FCFA, "[a] claimant's *exclusive* avenue of recovery becomes the forfeiture proceeding itself (emphasis added)."

118, 123, 118 S.Ct. 502, 506 (1997). In effect, the District Court is saying FCFA precludes civil rights actions regarding forfeitures, even though officers acting without exigent circumstances in a search and seizure expose themselves to potential civil liability under 42 U.S.C. §1983. *Segura v. U.S.*, 468 U.S. 796, 812, 104 S.Ct. 3380, 3389 (1984).

Conclusion

The District Court and the Court of Appeals committed clear error in ruling Moore and Finklea acted reasonably in re-seizing Lambert's car under a false pretext and without a warrant. Releasing the car meant her car was no longer forfeitable contraband and the re-seizure was a *new and separate* seizure. Therefore, re-seizing it required a warrant supported by *new or different* probable cause. Also, using a pretextual traffic stop for the re-seizure is proof their actions were clearly illegal. Finally, despite the court's contention, the adversarial preliminary hearing under FCFA did not preclude a hearing on her civil rights claims.

Wherefore, Lambert requests this court reverse the Court of Appeals and reinstate her claims against the appellees, plus grant her any further relief the court deems appropriate.

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Appendix A – Order of the United States District Court for the Middle District of Florida
Dated and filed August 16, 2006

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MADELINE M. LAMBERT,
Plaintiff,

v. **Case No. 8:06-cv-598-T-30TBM**

CHARLES J. CRIST, JR., et al.,
Defendants.
_____/

ORDER

THIS CAUSE comes before the Court upon Defendants' Crist, Finklea, Dietz, and Moore's Motion to Dismiss Amended Complaint and Supporting Memorandum of Law (Dkt. #14), Plaintiff's Response to Motion to Dismiss Amended Complaint and Supporting Memorandum of Law (Dkt. #15), Defendants' Reply Brief (Dkt. #19), and Plaintiff's Response to Reply Brief (Dkt. #22).[8] The Court, having reviewed the amended complaint, motion, responses, memoranda, and being otherwise advised in the premises, finds that Defendants' motion should

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8 The Court notes that Plaintiff requests an oral argument as to Defendant's Motion to Dismiss, however, an oral argument does not appear necessary.

be granted as stated herein.

Plaintiff's Allegations

Plaintiff, Madeline M. Lambert ("Plaintiff"), brings a five count complaint against Defendants, Charles J. Crist, Jr. ("Crist"), Rosena Finklea ("Finklea"), Robert Dietz ("Dietz"), and Richard Moore ("Moore"), collectively referred to herein as (the "Defendants") alleging as follows: Count I - Violation of civil rights by Moore pursuant to §42 U.S.C. 1983; Count II - Violation of civil rights by Finklea pursuant to §42 U.S.C. 1983; Count III - Violation of civil rights by MacMillan pursuant to §42 U.S.C. 1983; Count IV - Violation of civil rights by Dietz pursuant to §42 U.S.C. 1983; and Count V - Supervisor Liability Against Crist pursuant to §42 U.S.C. 1983.

In summary, Plaintiff alleges that on January 2, 2005, Moore, a Florida Highway Patrol ("FHP") trooper arrested Plaintiff's brother, Steven Gaudreau, in Manatee County for driving under the influence of alcohol and driving with a suspended license. Plaintiff was not in the car at the time. Plaintiff's brother was staying with her and "just took the car." After arresting Gaudreau, Moore seized the car pursuant to Fla. Stat. §932.701, *seq.*, and had it towed to a Florida Highway Patrol impound yard. On January 3, 2005, Plaintiff went to the impound yard and paid the towing charge to release her car.

On January 12, 2005, Moore stopped Plaintiff as she was driving off her property and onto a public highway. Moore told Plaintiff that her car had been released by mistake, and then he re-seized the vehicle and gave her a notice of seizure.

On February 1, 2005, an adversarial preliminary hearing was held as required under Fla. Stat. §932.703. Moore testified as to the events surrounding the arrest of Plaintiff's brother and the initial seizure of the car as well as the events relating to the re-seizure of Plaintiff's vehicle. Moore allegedly testified that

FHP's in-house counsel told him to stop Plaintiff's car for a traffic violation and re-seize it.

Plaintiff alleges that Judge Gilner ruled that "FHP failed to establish probable cause for the initial seizure because no evidence of any kind was presented to show Lambert knew or should have known the driver was using her car for an illegal purpose." Accordingly, Judge Gilner ordered FHP to return the car to Plaintiff.

FHP did not release the car but instead, after two unsuccessful motions to stay, filed a notice of appeal. On November 16, 2005, the Second District Court of Appeal of Florida unanimously upheld Judge Gilner's findings and ordered FHP to release the Plaintiff's vehicle and pay Plaintiff's costs and attorney's fees. On February 13, 2006, Judge Dubensky, a successor judge, issued an order awarding certain costs and attorney's fees to Plaintiff.

Plaintiff claims that the re-seizure of her car and its continued impoundment throughout the forfeiture action caused Lambert to suffer restraint of her liberty interests, damage to the car, damage for lost of use of the car, needless delay, undue economic and physical hardship, lost income, aggravation of physical injuries, and emotional and mental distress.

Plaintiff alleges Defendants violated her Fourth Amendment right to be free from unreasonable searches and seizures, her Fifth and Fourteenth Amendment due process rights, her corresponding rights under Article 1, Sections 9 and 12 of the Florida Constitution, and the public policy stated in Fla. Stat. §932.704(1).

Defendants argue that Plaintiff has failed to state a claim for which relief may be granted based on the following grounds: (1) Moore and Finklea are entitled to qualified immunity for the seizure of the vehicle; (2) Dietz is entitled to absolute immunity

for assisting MacMillan in the forfeiture proceedings; (3) Crist cannot be held liable as a supervisor under Section 1983; (4) due process was not violated; and (4) the FCFA does not create a private cause of action.

Motion to Dismiss Standard Under 12(b)(6)

To warrant dismissal of a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, it must be "clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Blackston v. State of Alabama, 30 F.3d 117, 120 (11th Cir. 1994), quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). Determining the propriety of granting a motion to dismiss requires courts to accept all the factual allegations in the complaint as true and to evaluate all inferences derived from those facts in the light most favorable to the plaintiff. See Hunnings v. Texaco, Inc., 29 F.3d 1480, 1483 (11th Cir. 1994). The threshold of sufficiency that a complaint must meet to survive a motion to dismiss is exceedingly low. See Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 703 (11th Cir. 1985). "Unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," the complaint should not be dismissed on grounds that it fails to state a claim upon which relief may be granted. Sea Vessel, Inc. v. Reyes, 23 F.3d 345, 347 (11th Cir. 1994). Nevertheless, to survive a motion to dismiss, a plaintiff must do more than merely "label" his claims. Blumel v. Mylander, 919 F.Supp. 423, 425 (M.D. Fla. 1996). Moreover, when on the basis of a dispositive issue of law no construction of the factual allegations will support the cause of action, dismissal of the complaint is appropriate. Marshall County Bd. Of Educ. v. Marshall County Gas Dist., 992 F.2d 1171, 1174 (11th Cir. 1993).

Discussion

I. QUALIFIED IMMUNITY.

Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); see also Rich v. Dollar, 841 F.2d 1558, 1563 (11th Cir. 1988). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986). Qualified immunity is a defense not only from liability, but from suit, which makes it important for a court to ascertain the validity of a qualified immunity defense as early in the lawsuit as possible. See Hill v. Dekalb Reg'l Youth Detention Ctr., 40 F.3d 1176, 1184 (11th Cir. 1994).

A. Two-step Analysis.

The test for whether a governmental defendant is entitled to qualified immunity from liability in his or her individual capacity involves a two-step analysis. First, the government official must demonstrate that he was "acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." Rich, 841 F.2d 1558, 1562-64. "Once a defendant establishes that he was acting within his discretionary authority, the burden shifts to the plaintiff to show that the defendant is not entitled to qualified immunity." Migut v. Flynn, 131 Fed.Appx. 262, 264 (11th Cir. 2005).

Second, if the government official satisfies his burden, the plaintiff must show that the official's actions violated clearly established constitutional law. See Harbert Int'l., Inc. v. James, 157 F.3d 1271, 1282 (11th Cir. 1998). Under this prong, the court must determine whether the applicable law was clearly established at the time of the challenged action. See Id. The

relevant inquiry is "fact specific," and a plaintiff must point to a controlling case, decided before the events at issue, that establishes a constitutional violation on "materially similar" facts. See Rodgers v. Horsley, 39 F.3d 308, 311 (11th Cir. 1994); see also Lassiter v. Alabama A & M Univ., Bd. Of Trustees, 28 F.3d 1146, 1150 (11th Cir. 1994). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). Absent a controlling and factually on-point case, a plaintiff can overcome qualified immunity only when "the official's conduct lies so obviously at the core" of what the constitutional provision forbids "that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law." Smith v. Mattox, 127 F.3d 1416, 1419 (11th Cir. 1997).

B. Question Of Law.

A district court's decision to grant or deny the defense of qualified immunity is a question of law. See Chesser v. Sparks, 248 F.3d 1117, 1121 (11th Cir. 2001). "It is therefore appropriate for a district court to grant the defense of qualified immunity at the motion to dismiss stage if the complaint 'fails to allege the violation of a clearly established constitutional right'." Gonzalez v. Reno, 325 F.3d 1228, 1233 (11th Cir. 2003), quoting Williams v. Ala. State Univ., 102 F.3d 1179, 1182 (11th Cir. 1997).

C. 12(b)(6) Motion To Dismiss Standard When Qualified Immunity Is At Issue.

Generally, a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See In re Johannessen, 76 F.3d 347, 349 (11th Cir. 1996). However, when the affirmative defense of

qualified immunity is raised in a Rule 12(b)(6) motion to dismiss, heightened pleading is required so that the court can evaluate whether the allegedly violated right was clearly established when the allegedly wrongful acts occurred. See Oladeinde v. City of Birmingham, 963 F.2d 1481, 1485 (11th Cir. 1992). As noted by the Eleventh Circuit in GJR Investments, when a government official moves to dismiss a claim on the basis of qualified immunity, "the qualified immunity inquiry and the Rule 12(b)(6) standard become intertwined." GJR Investments, 132 F.3d 1359, 1366 (11th Cir. 1998); See Wooten v. Campbell, 49 F.3d 696, 699 (11th Cir. 1995). Even though Rule 8 of the Federal Rules of Civil Procedure generally gives a plaintiff considerable leeway in pleading his case, this heightened pleading requires more detailed allegations, because the court must have more specific information before it to evaluate adequately such a claim on a motion to dismiss. See GJR Investments, 132 F.3d 1359, 1367. Consequently, under current Eleventh Circuit law, a plaintiff pursuing a violation of his constitutional rights must come forward with specific facts, concerning each defendant, indicating that each defendant has not only violated a constitutional right, but a clearly established one. Id. Otherwise, when presented with a motion to dismiss, the court must conclude that the defendants, sued in their individual capacities, are entitled to qualified immunity. Id.

Moreover, in reviewing a motion to dismiss, we need only accept "well-pleaded facts" and "reasonable inferences drawn from those facts." Oladeinde, 963 F.2d 1481, 1485. "Unsupported conclusions of law or of mixed fact and law have long been recognized not to prevent a Rule 12(b)(6) dismissal." Marsh v. Butler County, Ala., 268 F.3d 1014, 1036 n. 16 (11th

Cir. 2001). We must also keep in mind the fact that we generally accord official conduct a presumption of legitimacy. See United States Dep't. Of State v. Ray, 502 U.S. 164, 179 (1991).

II. WHETHER MOORE AND FINKLEA ACTED WITHIN THEIR DISCRETIONARY AUTHORITY.

In the instant case, Plaintiff alleges a violation of her Fourth Amendment right to be free from unreasonable search and seizure, her Fifth and Fourteenth Amendment rights to due process, along with her corresponding rights under Article 1, Sections 9 and 12 of the Florida Constitution, and the public policy of §932.704. Plaintiff claims that Defendant Moore, a FHP trooper, improperly re-seized her vehicle without a warrant, probable cause, or exigent circumstances. Plaintiff further claims that Defendant Finklea, FHP's assistant general in-house counsel, improperly told Moore to stop Plaintiff's car under the pretext of a traffic stop and re-seize it, regardless of whether he had a warrant, probable cause, or exigent circumstances to do so. Plaintiff asserts that her rights were so clearly established that any reasonable government actor in Moore or Finklea's position would have known his/her actions were illegal.

Defendants, Moore and Finklea, argue that they acted within their discretionary authority when Plaintiff's vehicle was re-seized and that they did not violate Plaintiff's constitutional rights, thus they are entitled to qualified immunity.

A. Moore's Participation.

1. Initial Seizure of Vehicle by Moore.

Plaintiff alleges that: on January 2, 2005, her brother was arrested for driving under the influence of alcohol and

driving with a suspended license; her brother was driving her car; her brother told Moore that he was staying with his sister and "just took the car"; after arresting Plaintiff's brother, Moore seized the car pursuant to Fla. Stat. §932.701; and Moore had the car towed to a FHP impound yard, without giving either Plaintiff or her brother a notice of seizure.

Pursuant to Fla. Stat. §322.34, motor vehicles that are driven by a person under the influence of alcohol or drugs are subject to seizure and forfeiture under Fla. Stat. §§932.701-932.707, if at the time of the offense, the person's driver's license is suspended, revoked, or canceled as a result of a prior conviction for driving under the influence. See Fla. Stat. §322.34(9)(a). Fla. Stat. §322.34(9) states, in pertinent part:
(a) A motor vehicle that is driven by a person under the influence of alcohol or drugs in violation of s. 316.193 is subject to seizure and forfeiture under ss. 932.701-932.707 and is subject to liens for recovering, towing, or storing vehicles under s. 713.78 if, at the time of the offense, the person's driver's license is suspended, revoked, or canceled as a result of a prior conviction for driving under the influence.
(b) The law enforcement officer shall notify the Department of Highway Safety and Motor Vehicles of any impoundment or seizure for violation of paragraph (a) in accordance with procedures established by the department.

While the underlying police report is not before this Court, Defendant has argued (and Plaintiff has not disputed) that Plaintiff's brother was in fact under the influence of alcohol while driving Plaintiff's vehicle and at the time of the offense Plaintiff's brother was driving with a suspended license, which was apparently suspended as a result of a prior conviction for driving under the influence. Under these circumstances,

Plaintiff's vehicle was subject to seizure and forfeiture proceedings under Fla. Stat. §322.34(9). Accordingly, Moore's participation in the initial seizure of Plaintiff's vehicle was clearly within his discretionary authority as a Florida Highway Patrol trooper.

2. Re-seizure of Vehicle by Moore.

Plaintiff alleges that: on January 3, 2005, Plaintiff went to the impound yard and paid the towing charge to release her car; on January 12, 2005, Moore staked out Plaintiff's apartment and stopped her car as she was driving off her property and onto a public highway; Moore told Plaintiff that her car had been released by mistake; Moore then re-seized the car and gave Plaintiff a notice of seizure.

Pursuant to Fla. Stat. §932.703(2)(a), a vehicle may be seized at the time of the violation or subsequent to the violation, if the person entitled to notice is notified at the time of the seizure or by certified mail, return receipt requested, that there is a right to an adversarial preliminary hearing after the seizure to determine whether probable cause exists to believe that such property has been or is being used in violation of the Florida Contraband Forfeiture Act. Fla. Stat. §932.703(2)(a) states:

> Personal property may be seized at the time of the violation or subsequent to the violation, if the person entitled to notice is notified at the time of the seizure or by certified mail, return receipt requested, that there is a right to an adversarial preliminary hearing after the seizure to determine whether probable cause exists to believe that such property has been or is being used in violation of the Florida Contraband Forfeiture Act. Seizing agencies shall make a diligent effort to notify the person entitled to notice of the seizure. Notice provided by certified mail must be

> mailed within 5 working days after the seizure and must state that a person entitled to notice may request an adversarial preliminary hearing within 15 days after receiving such notice. When a post-seizure, adversarial preliminary hearing as provided in this section is desired, a request must be made in writing by certified mail, return receipt requested, to the seizing agency. The seizing agency shall set and notice the hearing, which must be held within 10 days after the request is received or as soon as practicable thereafter.

Accordingly, notice may be provided to a person entitled to receive notice of the seizure within five working days after the seizure.

As this Court has already noted above, Moore acted within his discretionary authority when he initially seized Plaintiff's vehicle on January 2, 2005. According to Plaintiff's allegations she was able to retrieve her car from the FHP impound yard the following day. Thus, it appears there would be no reason to send Plaintiff a notice of seizure within 5 days of January 2, 2005.

However, Plaintiff admits that Moore did give her a notice of seizure, on January 12, 2005, when Moore re-seized Plaintiff's vehicle and explained that the impound yard had mistakenly released the vehicle. Since Fla. Stat. §932.703(2)(a) allows a vehicle to be seized at the time of the violation or subsequent to the violation, it appears that once again Moore acted within his discretionary authority when he re-seized the vehicle on January 12, 2005. Moreover, Plaintiff admits that Moore gave her a notice of seizure at that time.

For these reasons, the Court concludes that Moore acted within his discretionary authority when he initially seized the vehicle and when he re-seized the vehicle.

B. Finklea's Participation.

1. Initial Seizure of Vehicle.

Plaintiff has not alleged that Finklea participated or was involved in the initial seizure of the vehicle. Thus, it is not necessary for this Court to determine whether Finklea acted within her discretionary authority in relation to the initial seizure of the vehicle.

2. Re-seizure of Vehicle Upon Advice of Finklea.

Plaintiff alleges that: Finklea told Moore to stop Plaintiff's car under the pre-text of a traffic stop and re-seize it regardless of whether he had a warrant, probable cause, or exigent circumstances to do so; Finklea acted in an investigative capacity to guide the police outside the confines of a judicial setting; Finklea's actions were not taken in good faith and were a gross abuse of her discretion.

As discussed above, Fla. Stat. §932.703(2)(a) allows a vehicle to be seized at the time of the violation or subsequent to the violation. Thus, Florida law supports seizure after the date of the violation. Furthermore, Fla. Stat. §932.703(2)(a) only requires the seizing officer to give a notice of seizure to persons entitled to notice. The officer's "probable cause" would depend on the circumstances of the initial violation. There does not appear to be a requirement that the officer have a warrant or court order where the car itself is the contraband. See Florida v. White, 526 U.S. 559, 565 (1999) (Supreme Court held that Fourth Amendment did not require police to obtain a warrant before seizing an automobile in a public area where the automobile, as opposed to its contents, is the contraband); see also State v. Pomerance, 434 So.2d 329, 330 (Fla. 2d DCA 1983) (the Second District Court of Appeal of Florida held that a warrant is not required under the FCFA to seize a car).

For these reasons, the Court concludes that Finklea acted within her discretionary authority when she advised Moore that he was entitled to re-seize the vehicle.

C. Probable Cause Determination Pursuant to

Requirements of The Florida Contraband Forfeiture Act, Fla. Stat. §§932.701-932.707.

The Florida Contraband Forfeiture Act (the Act), sections 932.701-932.707, Florida Statutes (2004), makes it unlawful to use personal property as an instrumentality in the commission of any felony. See In re Forfeiture of 2003 Chevrolet Corvette, Case No. 2D05-5346, 2006 WL 1878985, *1 (Fla. 2d DCA July 7, 2006). Following a seizure, the person whose property has been seized has the right to request an adversarial preliminary hearing. §932.703(2).

A seizure and forfeiture action requires a two step process. See Wheeler v. Corbin, 546 So.2d 723, 725 (Fla. 1989). First, the validity of the seizure depends on the presence of probable cause to believe that the property seized was being used in violation of the Act. If the officer reasonably believes that the vehicle was being used in violation of the Act, then the vehicle may be seized. See id. Second, the validity of the forfeiture proceedings depend on a finding by the court at an adversarial preliminary hearing (if requested) that the property was in fact being used in violation of the Act. See id.

In an adversarial preliminary hearing, the seizing agency is required to establish probable cause that the seized property was used during the commission of a felony. In re Forfeiture of 2003 Chevrolet Corvette at *1. Section 932.703(2)(c), governing adversarial preliminary hearings, states, in pertinent part:

When an adversarial preliminary hearing is held, the court shall review the verified affidavit and any other supporting documents and take any testimony to determine whether there is probable cause to believe that the property was used, is being used, was attempted to be used, or was intended to be used in violation of the Florida Contraband Forfeiture Act. If probable cause is established, the court shall authorize the seizure or continued seizure of the subject contraband.

Notably, the Legislature has provided that the trial court's role

at an adversarial preliminary hearing is to determine whether there "is" probable cause to believe that a violation of the Act occurred or is occurring, not whether there "was" probable cause to believe that a violation of the Act occurred at the time of seizure. Beary v. Bruce, 804 So.2d 579, 581 (Fla. 5th DCA 2002). Additionally, section 932.703(2)(c) unambiguously provides that at an adversarial preliminary hearing, the trial court shall review the verified affidavit and any other supporting documents and take any testimony to determine the issue of probable cause. See id. Strictly construing this language supports the conclusion that probable cause is determined in light of the totality of the circumstances at the time of the preliminary hearing, not just the circumstances at the time of the seizure. Id. Further, the question of whether probable cause exists involves "whether the information relied upon by the state is adequate and sufficiently reliable to warrant the belief by a reasonable person that a violation had occurred." Department of Highway Safety and Motor Vehicles v. Tarman, 917 So.2d 899, 901 (Fla. 3d DCA 2005), citing Cox v. Department of Highway Safety and Motor Vehicles, 881 So.2d 641 (Fla. 5th DCA 2004).

As with the arrest of a person, the seizure of property under the forfeiture act must be based on probable cause. Wheeler v. Corbin, 546 So.2d 723, 725 (Fla. 1989). In Florida, no forfeiture action can proceed without a judicial determination that probable cause existed to seize the property. See id. As with an arrest, the subsequent determination in the forfeiture proceeding that the property was not in fact being used in violation of the forfeiture act does not retroactively invalidate the seizure itself. Id., citing Morton v. Gardner, 513 So.2d 725, 729 (Fla. 3rd DCA 1987). The claimant's exclusive avenue of recovery then becomes the forfeiture proceeding itself, where he may prove by a preponderance of the evidence (as Plaintiff did in this case) that the forfeiture statute was not violated. Morton at 728.

Moreover, the purpose of an adversarial preliminary hearing is "to make a de novo determination as to whether probable cause exists to maintain the forfeiture action; and to determine whether continued seizure of the property is the least restrictive means warranted by the circumstances to protect against disposal of the property pending final disposition." Department of Natural Res. v. Forfeiture of One Vessel Described as a 1950, 62 Ft. White De Vries Len Ketch Sailboat, 617 So.2d 773, 774 (Fla. 3d DCA 1993).

It is error for a trial court to state "that the purpose of the preliminary hearing was to determine whether probable cause existed to forfeit certain properties seized by the sheriff." See Beary v. Bruce, 804 So.2d 579, 581. Rather, the purpose of a preliminary hearing is to determine if probable cause exists "at the time of the hearing in order to enable the sheriff to continue holding the seized property pending its final disposition at a later forfeiture hearing." See id.

The underlying facts in Department of Highway Safety and Motor Vehicles v. Tarman, 917 So.2d 899, 901 (Fla. 3d DCA 2005) are very similar to the allegations in this case. In Tarman, Tarman admitted that he had a prior conviction for DUI, the he was driving under the influence of alcohol and marijuana, and that he was driving without a valid license. Given Tarman's admissions, the trooper's testimony and the Department's records which show that Tarman's license had been revoked and had never been reinstated, the Third District Court of Appeal held that the Department had probable cause for the seizure of Tarman's vehicle pursuant to Fla. Stat. §§322.34(9)(a) and 932.701(2)(a)(9).

Likewise, in the instant case, Plaintiff has alleged that her brother was arrested for driving her car while under the influence of alcohol and with a suspended license. Her brother's actions automatically subject her vehicle to seizure under Fla. Stat. §§322.34(9)(a) and 932.701(2)(a)(9). The pivotal difference in this

case is that Plaintiff was the sole owner of the vehicle - her brother had no legal interest in the vehicle. Since Plaintiff was the owner of the vehicle, she was entitled to bring the statutory affirmative defense known as the "innocent owner" defense as provided in §932.703(6)(a) which states:

> Property may not be forfeited under the Florida Contraband Forfeiture Act unless the seizing agency established by the preponderance of the evidence that the owner either knew, or should have known after a reasonable inquiry, that the property was being employed or was likely to be employed in criminal activity.

The "innocent owner" defense is one of the many factors that a trial court should consider during an adversarial preliminary hearing. See Beary, 804 So.2d 579.

For these reasons, the Court concludes that the information relied upon by Moore, and later by Finklea, is adequate and sufficiently reliable to warrant the belief by a reasonable person that a violation subjecting the vehicle to seizure under Fla. Stat. §§322.34(9)(a) and 932.701(2)(a)(9) had occurred.

D. Whether Moore and Finklea Violated Plaintiff's Clearly Established Constitutional Rights.

Plaintiff alleges that her constitutional rights have been violated as a result of the re-seizure of her car by Moore upon the advice of Finklea. Plaintiff repeatedly alleges that the state trial court found that Moore did not have probable cause to justify forfeiture. While this assertion appears to be correct, such fact does not necessarily mean that Plaintiff's constitutional rights have been violated.

1. Fourth Amendment.

Plaintiff's argument that Moore did not have probable cause to

seize her vehicle is misplaced. Plaintiff's vehicle was subject to seizure by virtue of the fact that it was being driven by her brother while he operated such vehicle under the influence of alcohol and with a suspended license. Notably, Plaintiff has not and cannot assert that Moore lacked probable cause to pull Plaintiff's brother over for driving under the influence of alcohol with a suspended license. Rather, Plaintiff asserts that Moore did not have probable cause to "re-seize" her vehicle on January 12, 2005. As discussed above, Florida law does not require Moore to have independent "probable cause", a court order or a warrant to seize Plaintiff's vehicle subsequent to the DUI violation. Further, as discussed above, the Court has concluded that Moore and Finklea acted within the boundaries of the applicable statutory law.

2. Due Process.

Presumably, Plaintiff presented evidence at the adversarial preliminary hearing which induced the trial court to find that Plaintiff did not know that her vehicle was being employed or was likely to be employed in criminal activity (i.e. driven by her brother while under the influence of alcohol with a suspended license). The trial and appellate courts ruled in Plaintiff's favor. Plaintiff received her day in court, and ultimately, received an award of attorneys fees and costs incurred through the trial court and appellate proceedings pursuant to the provisions of Fla. Stat. §932.704.

The Supreme Court of Florida has held that the FCFA comports with substantive and procedural due process. See Department of Law Enforcement v. Real Property, 588 So.2d 957 (Fla. 1991). The Supreme Court held that due process requires that notice of any seizure or forfeiture be given to the property owner, along with notice of the right to contest a seizure by requesting an adversarial preliminary hearing. Id. at 966. The Supreme Court also held that the procedures in place for litigating forfeiture actions contained within the FCFA were

constitutional. Id. Likewise, federal due process is not violated when a party has available a meaningful post-deprivation remedy. Lindsey v. Storey, 936 F.2d 554, 561 (11th Cir. 1991).

Thus, neither Plaintiff's due process or Fourth Amendment rights were violated and it would appear that Plaintiff has been awarded costs and attorney's fees pursuant to the relief provided in the FCFA. As a result, Plaintiff fails to meet her burden of demonstrating that Defendants Moore and Finklea violated her clearly established constitutional rights.

For these reasons, the Court concludes that Moore and Finklea are entitled to qualified immunity and should be dismissed from this action. Accordingly, Counts I and II are dismissed with prejudice.

III. ABSOLUTE IMMUNITY.

In support of Counts III and IV, Plaintiff alleges that: Assistant Attorney General MacMillan[9] and Assistant Attorney General Dietz violated Plaintiff's rights by failing to release Plaintiff's vehicle during the pendency of the forfeiture and appeal proceedings; MacMillan represented FHP in the forfeiture action at issue and Dietz assisted MacMillan.

A prosecutor receives absolute immunity for acts "that are connected with the prosecutor's role in judicial proceedings." Burns v. Reed, 500 U.S. 478, 494 (1991). Absolute immunity applies in the same fashion to non-prosecuting attorneys who perform functions analogous to a prosecutor, including those who decide to move forward

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9 From a review of the docket, it does not appear that Yvette MacMillan has been served. Nevertheless, in the interest of efficiency, the Court will address the claims brought against her by Plaintiff in the Amended Complaint.

with an administrative proceeding. Butz v. Economou, 438 U.S. 478, 515 (1978). Absolute immunity applies to the initiation and pursuit of a prosecution, court appearances, in-court activity, preparation and filing of charging documents, and determination that evidence demonstrates probable cause. Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993); Rowe v. City of Ft. Lauderdale, 279 F.3d 1271, 1279 (11th Cir. 2002); Kalina v. Fletcher, 522 U.S. 118 (1997). Absolute immunity also applies in the context of non-criminal proceedings, including forfeiture proceedings. See Amos v. State, Dept. Of Legal Affairs, 666 So.2d 933, 935 (Fla. 2d DCA 1995).

Accordingly, Defendants, Yvette MacMillan (assistant attorney general) and Robert Dietz (assistant attorney general) are entitled to absolute immunity in relation to Plaintiff's civil rights claims; and therefore, Counts III and IV asserted against Defendants MacMillan and Dietz should be dismissed with prejudice.

IV. SUPERVISOR LIABILITY.

Plaintiff alleges that: Crist had a duty to protect Plaintiff's constitutional rights; Crist was aware of Moore's, Finklea's, MacMillan's and Dietz's actions, because on March 7, 2005, Plaintiff's counsel sent Crist a letter detailing those actions; Crist failed to order MacMillan, Dietz or Finklea to release Plaintiff's car; Crist's failure to intervene constitutes deliberate indifference to the violations of Plaintiff's statutory and constitutional rights; Plaintiff's rights were so clearly established that any reasonable government actor in his position would have known the car's re-seizure was illegal; Crist's failure to intervene was a gross abuse of his discretion and caused Plaintiff's damages.

Defendant Crist argues that the claim against him should be dismissed because the Amended Complaint fails to state a cause of action for supervisory liability via deliberate indifference, and

Plaintiff's failure to establish that her constitutional rights have been violated. Defendant Crist's argument is well taken.

A three-pronged test is applicable to determine a supervisor's liability: (1) whether, in failing adequately to train and supervise subordinates, he was deliberately indifferent to Plaintiff's rights; (2) whether a reasonable person in the supervisor's position would know that his failure to train and supervise reflected deliberate indifference; and (3) whether his conduct was casually related to the constitutional infringement by his subordinate. Singleton v. McDougall, 932 F.Supp. 1386 (M.D. Fla. 1996), citing Greason v. Kemp, 891 F.2d 829, 836 (11th Cir. 1990).

Plaintiff has not provided a specific case or statute that places a duty on Crist to intervene in forfeiture proceedings while pending in state court. Further, Fla. Stat. §932.704(11)(a) specifically places the burden of enforcing compliance with the Florida Contraband Forfeiture Act upon the Department of Law Enforcement, in consultation with the Florida Sheriffs Association and the Florida Police Chiefs Association. Fla. Stat. §932.704(11)(a) states:

> The Department of Law Enforcement, in consultation with the Florida Sheriffs Association and the Florida Police Chiefs Association, shall develop guidelines and training procedures to be used by state and local law enforcement agencies and state attorneys in implementing the Florida Contraband Forfeiture Act. Each state or local law enforcement agency that files civil forfeiture actions under the Florida Contraband Forfeiture Act shall file, by December 31, 1995, a certificate signed by the agency head or his or her designee, which represents that the agency's policies and procedures are in compliance with the guidelines. Each state or local law enforcement agency that seizes property for the purpose of forfeiture shall

> periodically review seizures of assets made by the agency's law enforcement officers, settlements, and forfeiture proceedings initiated by the agency, to determine whether such seizures, settlements, and forfeitures comply with the Florida Contraband Forfeiture Act and the guidelines adopted under this subsection. **The determination of whether an agency will file a civil forfeiture action must be the sole responsibility of the head of the agency or his or her designee.** (Emphasis added.)

As discussed above, Plaintiff has failed to establish that her constitutional rights have been violated by Defendants Moore, Finklea, MacMillan or Dietz. Thus, Plaintiff has failed to establish that Crist had actual or constructive notice of unconstitutional practices carried out by his subordinates which triggered his duty to intervene, yet deliberately failed to take such action. Further, it does not appear that state law imposes a duty on Crist to intervene in forfeiture proceedings. Rather, such responsibility is specifically assigned by statute to the head of the seizing agency. Accordingly, Plaintiff has failed to state a cause of action for supervisor liability against Crist in Count V, therefore Count V should be dismissed.

It is therefore ORDERED AND ADJUDGED that:

1. Defendants' Crist, Finklea, Dietz, and Moore's Motion to Dismiss Amended Complaint and Supporting Memorandum of Law (Dkt. #14) is GRANTED as stated herein.
2. Plaintiff's Amended Complaint is dismissed in its entirety. Counts I, II, III and IV of the Amended Complaint are dismissed with prejudice. Defendants, Richard Moore and Rosena Finklea, are entitled to qualified immunity from these proceedings.

Defendants, Yvette MacMillan and Robert Dietz, are entitled to absolute immunity from these proceedings.

3. Plaintiff shall have thirty (30) days from the date of this Order in which to file a Second Amended Complaint.

DONE and **ORDERED** in Tampa, Florida, on August 16, 2006

S/ James S. Moody, Jr.
JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel/Parties of Record

Appendix B – Opinion of the United States Court of Appeals for the Eleventh Circuit
entered March 12, 2007

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-14926
Non-Argument Calendar

D.C. Docket No. 06-00598-CV-T-30-TBM

MADELINE M. LAMBERT,

Plaintiff-Appellant,

v.

CHARLES J. CRIST, JR.,
As Attorney General, State of Florida,
ROSENA FINKLEA, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(March 12, 2007)

Before ANDERSON, BLACK, and BARKETT, Circuit Judges.

PER CURIAM:

Madeline Lambert appeals the district court's dismissal of her 28 U.S.C. §1983 complaint against Richard Moore, Rosena Finklea, Yvette MacMillan, Robert Dietz, and Charles J. Crist, Jr. The district court concluded Moore and Finklea were entitled to qualified immunity, MacMillan and Dietz were entitled to absolute immunity, and Lambert failed to state a claim upon which relief may be granted against Crist for supervisor liability. After a de novo review, we affirm for the reasons stated in the district court's well-reasoned order of August 16, 2006.

AFFIRMED

APPENDIX C – Mandate of the United States Court of Appeals for the Eleventh Circuit

entered April 10, 2007

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-14926

District Court Docket No.
06-00598-CV-T-30-TBM

MADELINE M. LAMBERT,
Plaintiff-Appellant,

v.

CHARLES J. CRIST, JR.,
As Attorney General, State of Florida,
ROSENA FINKLEA,
YVETTE MACMILLAN,
ROBERT DIETZ,
RICHARD MOORE,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached

opinion included herein by reference is entered as the judgment of this court.

Entered:	March 12, 2007
For the Court:	Thomas K. Kahn, Clerk
By:	Jackson, Jarvis

Appendix D – Order of Dismissal from the United States District Court for the Middle District of Florida
Dated and filed May 15, 2007

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MADELINE M. LAMBERT,
Plaintiff,

v. **Case No. 8:06-cv-598-T-30TBM**

CHARLES J. CRIST, JR., et al.,
Defendants.
_____/

ORDER OF DISMISSAL

On March 12, 2007, the United States Court of Appeals for the Eleventh Circuit affirmed this Court's dismissal of Plaintiff's Amended Complaint. (Dkt. 27). Pursuant to the Court's telephone conference held on May 1, 2007, between Magistrate Judge Thomas B. McCoun, III, and counsel of record in this case, it has been determined that there are no pending matters before the Court and this case should now be

closed. In accordance with same, it is

ORDERED AND ADJUDGED as follows:

1. This cause is dismissed.

2. All pending motions are denied as moot.

3. The Clerk is directed to close this case.

4. DONE and ORDERED in Tampa, Florida, on May 15, 2007.

S/ James S. Moody, Jr.
JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel/Parties of Record

Appendix E. §932.701, Fla. Stat.

TITLE KLVII. **CRIMINAL PROCEDURE AND CORRECTIONS (CHAPTERS 900-999)**

CHAPTER 932. **PROVISIONS SUPPLEMENTAL TO CRIMINAL PROCEDURE LAW**

932.701. Short title; definitions

(1) Sections 932.701-932.707 shall be known and may be cited as the "Florida Contraband Forfeiture Act."

(2) As used in the Florida Contraband Forfeiture Act:

(a) "Contraband article" means:

1. Any controlled substance as defined in chapter 893 or any substance, device, paraphernalia, or currency or other means of exchange that was used, was attempted to be used, or was intended to be used in violation of any provision of chapter 893, if the totality of the facts presented by the state is clearly sufficient to meet the state's burden of establishing probable cause to believe that a nexus exists between the article seized and the narcotics activity, whether or not the use of the contraband can be traced to a specific narcotics transaction.

2. Any gambling paraphernalia, lottery tickets, money currency, or other means of exchange which was used, was attempted, or intended to be used in violation of the gambling laws of the state.

3. Any equipment, liquid or solid, which was being used, is being used, was attempted to be used, or intended to be used in violation of the beverage or tobacco laws of the state.

4. Any motor fuel upon which the motor fuel tax has not ben paid as required by law.

5. Any personal property, including, but not limited to, any vessel, aircraft, item, object, tool, substance, device, weapon, machine, vehicle of any kind, money, securities, books, records, research, negotiable instruments, or currency, which was used or was attempted to be used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony, whether or not comprising an element of the felony, or which is acquired by proceeds obtained as a result of a violation of the Florida Contraband Forfeiture Act.

6. Any real property, including any right, title, leasehold, or other interest in the whole of any lot or tract of land, which was used, is being used, or was attempted to be used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony, or which is acquired by proceeds obtained as a result of a violation of the Florida Contraband Forfeiture Act.

7. Any personal property, including, but not limited to, equipment, money, securities, books, records, research, negotiable instruments, currency, or any vessel, aircraft, item, object, tool, substance, device, weapon, machine, or vehicle of any kind in the possession of or belonging to any person who takes aquaculture products in violation of s. 812.014(2)(c).

8. Any motor vehicle offered for sale in violation of s. 320.28.

9. Any motor vehicle used during the course of committing an offense in violation of s. 322.34(9)(a).

10. Any photograph, film, or other recorded image, including an image recorded on videotape, a compact disc, digital tape, or fixed disk, that

is recorded in violation of s. 810.145 and is possessed for the purpose of amusement, entertainment, sexual arousal, gratification, or profit, or for the purpose of degrading or abusing another person.

11. Any real property, including any right, title, leasehold, or other interest in the whole of any lot or tract of land, which is acquired by proceeds obtained as a result of Medicaid fraud under s. 409.920 or s. 409.201; and personal property, including, but not limited to, equipment, money, securities, books, records, research, negotiable instruments, or currency; or any vessel, aircraft, item, object, tool, substance, device, weapon, machine, or vehicle of any kind in the possession of or belonging to any person which is acquired by proceeds obtained as a result of Medicaid fraud under s. 409.920 or 409.9201.

(b) "Bona fide lienholder" means the holder of a lien perfected pursuant to applicable law.

(c) "Promptly proceed" means to file the complaint within 45 days after seizure.

(d) "Complaint" is a petition for forfeiture filed in the civil division of the circuit court by the seizing agency requesting the court ot isse a judgment of forfeiture.

(e) "Person entitled to notice" means any owner, entity, bona fide lienholder, or person in possession of the property subject to forfeiture when seized, who is known to the seizing agency after a diligent search and inquiry.

(f) "Adversarial preliminary hearing" means a hearing in which the seizing agency is required to establish probable cause that the property

subject to forfeiture was used in violation of the Florida Contraband Forfeiture Act.

(g) "Forfeiture proceeding" means a hearing or trial in which the court or jury determined whether the subject property shall be forfeited.

(h) "Claimant" means any party who has proprietary interest in property subject to forfeiture and has standing to challenge such forfeiture, including owners, registered owners, bona fide lienholders, and titleholders.

Current with chapters in effect from the 2007 First Regular Session of the Twentieth Legislature through April 9, 2007.

Appendix F. §932.703, Fla. Stat.

TITLE KLVII. **CRIMINAL PROCEDURE AND CORRECTIONS (CHAPTERS 900-999)**

CHAPTER 932. **PROVISIONS SUPPLEMENTAL TO CRIMINAL PROCEDURE LAW**

932.703. Forfeiture of contraband article; exceptions

(1)(a) Any contraband article, vessel, motor vehicle, aircraft, other personal property, or real property used in violation of any provision of the Florida Contraband Forfeiture Act, or in, upon, or by means of which any violation of the Florida Contraband Forfeiture Act has taken or is taking place, may be seized and shall be forfeited subject to the provisions of the Florida Contraband Forfeiture Act.

(b) Notwithstanding any other provision of the Florida Contraband Forfeiture Act, except the provisions of paragraph (a), contraband articles set forth in s. 932.701(2)(a)7. Used in violation of any provision of the Florida Contraband Forfeiture Act, or in, upon, or by means of which and violation of the Florida Contraband Forfeiture Act has taken or is taking place, shall be seized and shall be forfeited subject to the provisions of the Florida Contraband Forfeiture Act.

(c) All rights to, interest in, and title to contraband articles used in violation of s. 932.702 shall immediately vest in the seizing law enforcement agency upon seizure.

(d) The seizing agency may not use the seized property for any purpose until the rights to, interest in, and title to the seized property are perfected in accordance with the Florida Contraband Forfeiture Act. This section does not prohibit use or operation necessary for reasonable maintenance of seized property. Reasonable efforts shall be made to maintain seized property in such a manner as to minimize loss of value.

(2)(a) Personal property may be seized a the time of the violation or subsequent to the violation, if the person entitled to notice is notified at the time of the seizure or by certified mail, return receipt requested, that there is a right to an adversarial preliminary hearing after the seizure to determine whether probable cause exists to believe that such property has been or is being used in violation of the Florida Contraband Forfeiture Act. Seizing agencies shall make a diligent effort to notify the person entitled to notice of the seizure. Notice provided by certified mail must be mailed within 5 working days after the seizure and must state that a person entitled to notice may request an adversarial preliminary hearing within 15 days after receiving such notice. When a postseizure, adversarial preliminary hearing as provided in this section is desired, a request must be made in writing by certified mail, return receipt requested, to the seizing agency. The seizing agency shall set an notice the hearing, which must be held within 10 days after the request is received or as soon as practicable thereafter.

(b) Real property may not be seized or restrained, other than by lis pendens, subsequent to a violation of the Florida Contraband Forfeiture Act until the persons entitled to notice are afforded the opportunity to attend the preseizure adversarial preliminary hearing. A lis pendens may be obtained by any method authorized by law. Notice of the adversarial preliminary hearing shall be by certified mail, return receipt requested. The purpose of the adversarial preliminary hearing is to determine whether probable cause exists to believe that such property has been used in violation of the Florida Contraband Forfeiture Act. The seizing agency shall make a diligent effort to notify any person entitled to notice of the seizure. The preseizure adversarial preliminary hearing provided herein shall be held within 10 days of the filing of the lis pendens or as soon as practicable.

(c) When an adversarial preliminary hearing is held, the court shall review the verified affidavit and any other supporting documentation and take any testimony to determine whether there is probable cause to believe that the property was used, is being used, was attempted to be used, or was intended to be used in violation of the Florida Contraband Forfeiture Act. If probable cause is established, the court shall authorize the seizure or continued seizure of the subject contraband. A copy of the findings of the court shall be provided to any person entitled to notice.

(d) If the court determines that probable cause to believe that such property was used in violation of the Florida Contraband Forfeiture Act, the court shall order the property restrained by the least restrictive means to protect against disposal, waste, or continued illegal use of such property pending disposition of the forfeiture proceeding. The court may order the claimant to post a bond or other adequate security equivalent to the value of the property.

(3) Neither replevin nor any other action to recover any interest in such property shall be maintained in any court, except as provided in this act; however, such action may be maintained if forfeiture proceedings are not initiated within 45 days after the date of seizure. However, if good cause is shown, the court may extend the aforementioned prohibition to 60 days.

(4) In any incident in which possession of any contraband article defined in s. 932.701(2)(a) constitutes a felony, the vessel, motor vehicle, aircraft, other personal property, or real property in or on which such contraband article is located at the time of seizure shall be contraband subject to forfeiture. It shall be presumed in the manner provided in 2. 90.302(2) hat the vessel, motor vehicle, aircraft, or other

personal property, or real property in or on which such contraband article is located at the time of seizure is being used or was attempted or intended to be used in a manner to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of a contraband article defined in s. 932.701(2).

(5) The court shall order the forfeiture of any other property of a claimant, excluding lienholders, up to the value of any property subject to forfeiture under this section if any of the property described int his section:

(a) Cannot be located;

(b) Has been transferred to, sold to, or deposited with, a third party;

(c) Has been placed beyond the jurisdiction of the court;

(d) Has been substantially diminished in value by any act or omission of the person in possession of the property; or

(e) Has been co-mingled with any property which cannot be divided without difficulty.

(6)(a) Property may not be forfeited under the Florida Contraband Forfeiture Act unless the seizing agency establishes by a preponderance of the evidence that the owner either knew, or should have known after a reasonable inquiry, that the property was being employed or was likely to be employed in criminal activity.

(b) A bona fide lienholder's interest that has been perfected in the manner prescribed by law prior to the seizure may not be forfeited under the Florida Contraband Forfeiture Act unless the seizing agency established by a preponderance of the evidence that the lienholder had actual knowledge, at the time the lien was made, that the property was being employed or was likely to be employed in criminal activity. If a lienholder's interest is not subject to forfeiture under the requirements of this section, such interest shall be preserved by the court by ordering the lienholder's interest to be paid as provided in s. 932.7055.

(c) Property tiled or registered between husband an wife jointly by the use of the conjunctives "and," "and/or," or "or," in the manner prescribed by law prior to the seizure, may not be forfeited under the Florida Contraband Forfeiture Act unless the seizing agency establishes by a preponderance of the evidence that the coowner either knew or had reason to know, after reasonable inquiry, that such property was employed or was likely to be employed in criminal activity.

(d) A vehicle that is rented or leased from a company engaged in the business of renting or leasing vehicles, which vehicle was rented or leased in the manner prescribed by law prior to the seizure, may not be forfeited under the Florida Contraband Forfeiture Act, and no fine, penalty, or administrative charge, other than reasonable and customary charges for towing and storage, shall be imposed by any governmental agency on the company which rented or leased the vehicle, unless the seizing agency establishes by a preponderance of the evidence that the renter or lessor had actual knowledge, at the time the vehicle was rented or leased, that the vehicle was being employed or was likely to be employed in criminal activity. When a vehicle that is rented or leased from a company engaged in the business of renting or leasing vehicles is seized under the Florida Contraband Forfeiture Act, upon learning the address or phone number

of the company, the seizing law enforcement agency shall, as soon as practicable, inform the company that the vehicle has been seized and is available for the company to take possession upon payment of the reasonable and customary charges for towing and storage.

(7) Any interest in, title to, or right to property registered jointly by the use of the conjunctives "and," "and/or," or "or" held by a coowner, other than property held jointly between husband and wife, may not be forfeited unless the seizing agency establishes by a preponderance of the evidence that the coowner either knew, or had reason to know, after reasonable inquiry, that the property was employed or was likely to be employed in criminal activity. When the interests of each culpable coowner are forfeited, any remaining coowners shall be afforded the opportunity to purchase the forfeited interest in, title to, or right to the property from the seizing law enforcement agency. If any remaining coowner does not purchase such interest, the seizing agency may hold the property in coownership, sell its interest in the property, liquidate its interest in the property, or dispose of its interest int eh property in any other reasonable manner.

(8) It is an affirmative defense to a forfeiture proceeding that the nexus between the property sought to be forfeited and the commission fo any underlying violation was incidental or entirely accidental. The value of the property sough to be forfeited in proportion to any other factors must not be considered in any determination as to this affirmative defense.

Current with chapters in effect from the 2007 First Regular Session of the Twentieth Legislature through April 9, 2007.

Appendix G. §932.704, Fla. Stat.

TITLE KLVII. **CRIMINAL PROCEDURE AND CORRECTIONS (CHAPTERS 900-999)**

CHAPTER 932. **PROVISIONS SUPPLEMENTAL TO CRIMINAL PROCEDURE LAW**

932.704. Forfeiture proceedings

(1) It is the policy of this state that law enforcement agencies shall utilize the provisions of the Florida Contraband Forfeiture Act to deter and prevent the continued use of contraband articles for criminal purposes while protecting the proprietary interests of innocent owners and lienholders and to authorize such law enforcement agencies to use the proceeds collected under the Florida Contraband Forfeiture Act as supplemental funding for authorized purposes. The potential for obtaining revenues from forfeitures must not override fundamental considerations such as public safety, the safety of law enforcement officers, or the investigation and prosecution of criminal activity. It is also the policy of this state that law enforcement agencies ensure that, in all seizures made under the Florida Contraband Forfeiture Act, their officers adhere to federal and state constitutional limitations regarding an individual's right to be free from unreasonable searches and seizures, including, but not limited to, the illegal use of stops based on a pretext, coercive-consent searches, or a search based solely upon an individual's race or ethnicity.

(2) In each judicial circuit, all civil forfeiture cases shall be heard before a circuit court judge of the civil division, if a civil division has been established. The Florida Rules of Civil Procedure shall govern forfeiture proceedings under the Florida Contraband Forfeiture Act unless otherwise specified under the Florida Contraband Forfeiture Act.

(3) Any trial on the ultimate issue of forfeiture shall be decided by a jury, unless such right is waived by the claimant through a written waiver or on the record before the court conducting the forfeiture proceeding.

(4) The seizing agency shall promptly proceed against the contraband article by filing a complaint in the circuit court within the jurisdiction where the seizure or the offense occurred.

(5)(a) The complaint shall be styled, "In RE: FORFEITURE OF _____" (followed by the name or description of the property). The complaint shall contain a brief jurisdictional statement, a description of the subject matter of the proceeding, and a statement of the facts sufficient to state a cause of action that would support a final judgment of forfeiture. The complaint must be accompanied by a verified supporting affidavit.

(b) If no person entitled to notice requests an adversarial preliminary hearing, as provided in s. 932.703(2)(a), the court, upon receipt of the complaint, shall review the complaint and the verified supporting affidavit to determine whether there was probable cause for the seizure. Upon a finding of probable cause, the court shall enter an order showing the probable cause finding.

(c) The court shall require any claimant who desires to contest the forfeiture to file and serve upon the attorney representing the seizing agency any responsive pleadings and affirmative defenses within 20 days after receipt of the complaint and probable cause finding.

(6)(a) If the property is required by law to be titled or registered, or if the owner of the property is known in fact to the seizing agency, or if the seized property is subject to a perfected security interest in

accordance with the Uniform Commercial Code, chapter 679, the attorney for the seizing agency shall serve the forfeiture complaint as an original service of process under the Florida Rules of Civil Procedure and other applicable law to each person having an ownership or security interest in the property. The seizing agency shall also publish, in accordance with chapter 50, notice of the forfeiture complaint once each week for 2 consecutive weeks in a newspaper of general circulation, as defined in s. 165.031, in the county where the seizure occurred.

(b) The complaint must, in addition to stating that which is required by s. 932.703(2)(a) and (b), as appropriate, describe the property; state the county, place, and date of seizure; state the name of the law enforcement agency holding the seized property; and state the name of the court in which the complaint will be filed.

(c) The seizing agency shall be obligated to make a diligent search and inquiry as to the owner of the subject property, and if, after such diligent search and inquiry, the seizing agency is unable to ascertain any person entitled to notice, the actual notice requirements by mail shall not be applicable.

(7) When the claimant and the seizing law enforcement agency agree to settle the forfeiture action prior to the conclusion of the forfeiture proceeding, the settlement agreement shall be reviewed, unless such review is waived by the claimant in writing, by the court or a mediator or arbitrator agreed upon by the claimant and the seizing law enforcement agency. If the claimant is unrepresented, the settlement agreement must include a provision that the claimant has freely and voluntarily agreed to enter into the settlement without benefit of counsel.

(8) Upon clear and convincing evidence that the contraband article was being used in violation of the Florida Contraband Forfeiture Act, the court shall order the seized property forfeited to the seizing law enforcement agency. The final order of forfeiture by the court shall perfect in the law enforcement agency right, title, and interest in and to such property, subject only to the rights and interests of bona fide lienholders, and shall relate back to the date of seizure.

(9)(a) When the claimant prevails at the conclusion of the forfeiture proceeding, if the seizing agency decides not to appeal, the seized property shall be released immediately to the person entitled to possession of the property as determined by the court. Under such circumstances, the seizing agency shall not assess any towing charges, storage fees, administrative costs, or maintenance costs against the claimant with respect to the seized property or the forfeiture proceeding.

(b) When the claimant prevails at the conclusion of the forfeiture proceeding, any decision to appeal must be made by the chief administrative official of the seizing agency, or his or her designee. The trial court shall require the seizing agency to pay to the claimant the reasonable loss of value of the seized property when the claimant prevails at trial or on appeal and the seizing agency retained the seized property during the trial or appellate process. The trial court shall also require the seizing agency to pay to the claimant any loss of income directly attributed to the continued seizure of income-producing property during the trial or appellate process. If the claimant prevails on appeal, the seizing agency shall immediately release the seized property to the person entitled to possession of the property as determined by the court, pay any cost as assessed by the court, and may not assess any towing charges, storage fees, administrative costs, or maintenance costs against the claimant with respect to the seized property or the forfeiture

proceeding.

(10) The court shall award reasonable attorney's fees and costs, up to a limit of $1,000, to the claimant at the close of the adversarial preliminary hearing if the court makes a finding of no probable cause. When the claimant prevails, at the close of forfeiture proceedings and any appeal, the court shall award reasonable trial attorney's fees and costs to the claimant if the court finds that the seizing agency has not proceeded at any stage of the proceedings in good faith or that the seizing agency's action which precipitated the forfeiture proceedings was a gross abuse of the agency's discretion. The court may order the seizing agency to pay the awarded attorney's fees and costs from the appropriate contraband forfeiture trust fund. Nothing in this subsection precludes any party from electing to seek attorney's fees and costs under chapter 57 or other applicable law.

(11)(a) The Department of Law Enforcement, in consultation with the Florida Sheriffs Association and the Florida Police Chiefs Association, shall develop guidelines and training procedures to be used by state and local law enforcement agencies and state attorneys in implementing the Florida Contraband Forfeiture Act. Each state or local law enforcement agency that files civil forfeiture actions under the Florida Contraband Forfeiture Act shall file, by December 31, 1995, a certificate signed by the agency head or his or her designee, which represents that the agency's policies and procedures are in compliance with the guidelines. Each state or local law enforcement agency that seizes property for the purpose of forfeiture shall periodically review seizures of assets made by the agency's law enforcement officers, settlements, and forfeiture proceedings initiated by the agency, to determine whether such seizures, settlements, and forfeitures comply with the Florida Contraband Forfeiture Act and the guidelines adopted under this

subsection. The determination of whether an agency will file a civil forfeiture action must be the sole responsibility of the head of the agency or his or her designee.

(b) The determination of whether to seize currency must be made by supervisory personnel. The agency's legal counsel must be notified as soon as possible.

Current with chapters in effect from the 2007 First Regular Session of the Twentieth Legislature through April 9, 2007.

(2)

FILED
AUG 15 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1658

IN THE

Supreme Court of the United States

MADELINE M. LAMBERT,

Petitioner,

v.

CHARLES J. CRIST, JR., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Did the Florida Highway Patrol have probable cause to seize Lambert's vehicle on January 2, 2005 pursuant to the Florida Contraband Forfeiture Act?

II. Did the Florida Highway Patrol impound yard's mistaken release of Lambert's seized vehicle on January 3, 2005 "purge" the vehicle from being tainted as forfeitable contraband under the Florida Contraband Forfeiture Act?

III. Did the Florida Contraband Forfeiture Act provide Lambert with a sufficient post-deprivation remedy so as not to violate her Fourth Amendment and due process rights?

LIST OF PARTIES

The Respondents are:

Charles J. Crist, Jr., who was the former Attorney-General for the state of Florida, whose department represented the Florida Highway Patrol ("FHP") in the forfeiture action described herein;

Rosena Finklea, who is the FHP's assistant general counsel on forfeiture matters;

Yvette MacMillan, who is the FHP's assistant attorney-general for the state of Florida, who represented the FHP in the forfeiture proceedings described herein;

Robert Dietz is an assistant attorney-general for the state of Florida, who assisted MacMillan in the forfeiture proceedings described herein; and

Richard Moore, who is a state trooper with the FHP.

The Petitioner, Madeline M. Lambert, was the Plaintiff in the lower court proceedings in this case and the Appellant before the United States Court of Appeals for the Eleventh Circuit.

CORPORATE DISCLOSURE STATEMENT

The Respondents are not incorporated, and therefore have no parent corporations of which to disclose ownership.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	3
I. Probable Cause Existed to Seize Lambert's Vehicle.	3
II. The Mistaken Release of Lambert's Vehicle Did Not "Purge It of Being Tainted as Forfeitable Contraband."	13
III. The FCFA Provided Lambert with a Sufficient Post-Deprivation Remedy so as Not to Violate Her Fourth Amendment and Due Process Rights Under the Constitution.	14
A. MacMillan and Dietz are Entitled to Absolute Immunity.	16

Contents

Page

B. Lambert Failed to State a Claim upon which Relief may be Granted for Supervisor Liability Against Crist. ... 18

CONCLUSION 21

TABLE OF CITED AUTHORITIES

Cases	Page
Baez v. Hennessy, 853 F.2d 73 (2d Cir. 1988)	17
Brown v. Crawford, 906 F.2d 667 (11th Cir. 1990)	19
Buckley v. Fitzsimmons, 509 U.S. 259 (1993)	17
Burns v. Reed, 500 U.S. 478 (1991)	17
Butz v. Economou, 438 U.S. 478 (1978)	17
Carroll v. United States, 267 U.S. 132 (1925)	4, 5
City of Coral Gables v. Valdes, 582 So. 2d 148 (Fla. 3d DCA 1991)	18
City of Daytona Beach v. Bush, 742 So. 2d 335 (Fla. 5th DCA 1999)	6
Coolidge v. New Hampshire, 403 U.S. 443 (1971)	10
Cooper v. Parrish, 203 F.3d 937 (6th Cir. 2000)	17
Department of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991)	15
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Page

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In re Forfeiture of 1987 Chevrolet, 605 So. 2d 1322 (Fla. 1st DCA 1992) 6

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In re Forfeiture of One Hundred Seventy-One Thousand Nine Hundred Dollars, 711 So. 2d 1269 (Fla. 3d DCA 1998) 6

Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1992) 19, 20

Kalina v. Fletcher, 522 U.S. 118 (1997) 17

Lindsey v. Storey, 936 F.2d 554 (11th Cir. 1991) .. 15

McLane v. Youngblood, 544 So. 2d 1179 (Fla. 2d DCA 1989) 18

Morton v. Gardner, 513 So. 2d 725 (Fla. 3d DCA 1987) 20

Murphy v. New York Racing Association, Inc., 76 F. Supp. 2d 489 (S.D.N.Y. 1999) 19

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Page

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Rodgers v. Horsley, 39 F.3d 308 (11th Cir. 1994) .. 9

Rowe v. Fort Lauderdale, 279 F.3d 1271 (11th Cir. 2002) 17

Smith v. Power, 346 F.3d 740 (7th Cir. 2003) 17

State v. Pomerance, 434 So. 2d 329 (Fla. 2d DCA 1983) 5

Swint v. City of Wadley, Alabama, 5 F.3d 1435 (11th Cir. 1993) 12

United States ex rel. Cabrera v. Page, 172 F. Supp.2d 966 (N.D. Ill. 2001) 12

United States v. Fuller, 374 F.3d 617 (8th Cir. 2004) 10

United States v. Magluta, 418 F.3d 1166 (11th Cir. 2005) 10-11

United States v. Rivers, 121 F.3d 1043 (7th Cir. 1997) 12

United States v. Silverstri, 787 F.2d 736 (1st Cir. 1986) 10, 13

Cited Authorities

Page

United States v. Valdes, 876 F.2d 1554 (11th Cir. 1989) 5

White v. Florida, 753 So. 2d 548 (Fla. 1999) 13

Ybarra v. Illinois, 444 U.S. 85 (1979) 12

Statutes

42 U.S.C. § 1983 .....3, 16, 18, 20

Fla. Stat. § 932.701 7

Fla. Stat. § 932.703 ..... *passim*

Fla. Stat. § 932.704 ..... 2, 9

STATEMENT OF THE CASE

On January 2, 2005, Moore, a state trooper for the Florida Highway Patrol ("FHP"), arrested Steven Gaudreau for driving under the influence of alcohol and driving with a suspended driver's license.[1] At the time of the arrest, Gaudreau told Moore that he was staying with his sister, Madeline Lambert, and "just took [her] car."[2] Moore concluded that Lambert's vehicle was forfeitable under the Florida Contraband Forfeiture Act ("FCFA"). Therefore, he seized the vehicle and had it towed to an FHP impound yard.

On January 3, 2005, the FHP impound yard released the vehicle to Lambert by mistake.

On January 12, 2005, Moore stopped Lambert's vehicle on a public highway and re-seized the vehicle because, as he explained to Lambert, the FHP impound yard had released her vehicle by mistake. Moore acted pursuant to an instruction from Finklea that he take back the vehicle because it had been mistakenly released and was needed for forfeiture proceedings under the FCFA. After he seized the vehicle, Moore gave Lambert a notice of seizure, which advised of her right to request a preliminary hearing pursuant to section 932.703(2)(a) of the Florida Statutes.

---

[1] Lambert made no suggestion in her Amended Complaint that the arrest was in any way improper or unjustified.

[2] Lambert made no allegations in her Amended Complaint that, at the time of arrest, Gaudreau told Moore that he had taken the vehicle without Lambert's knowledge or that Lambert did not know nor had any reason to know that Gaudreau may drive the vehicle under the influence of alcohol.

On February 1, 2005, a preliminary hearing was held pursuant to the FCFA to determine whether probable cause existed to believe that the vehicle had been or was being used in violation of the FCFA. The judge held that the FHP had not established probable cause for the initial seizure because there was no evidence that Lambert knew or should have known that her brother was using her vehicle for an illegal purpose. The judge ordered the FHP to release her car. In other words, Lambert succeeded on her "innocent owner defense" pursuant to section 932.703(6)(a) of the Florida Statutes.

The FHP did not release the vehicle because it filed an appeal with the Second District Court of Appeal for the State of Florida. However, after the Second District Court of Appeal issued a per curiam affirmance of the Circuit Court's order, the FHP complied with the appeal court's order and released Lambert's vehicle. On February 13, 2006, Lambert was awarded attorney's fees and costs.

On March 16, 2006, Lambert filed a civil rights action in state court, later removed to federal court by the Respondents, claiming that her car's re-seizure and continued impoundment throughout the forfeiture action violated her Fourth Amendment right to be free from unreasonable searches and seizures, her Fifth and Fourteenth Amendment substantive due process rights, her corresponding rights under Article I, Sections 9 and 12 of the Florida Constitution, and the public policy contained in section 932.704(1) of the Florida Statutes.

On April 28, 2006, the Respondents moved to dismiss all of Lambert's claims, arguing that she failed to state a claim for relief because (1) Moore and Finklea were entitled to

qualified immunity for the seizure of her vehicle under the FCFA; (2) Dietz was entitled to absolute immunity for assisting MacMillan in prosecuting the forfeiture action; (3) Crist could not be held liable as a supervisor under 42 U.S.C. § 1983; (4) Lambert's due process rights were not violated; and (5) the FCFA does not create a private cause of action. On August 16, 2006, the District Court for the Middle District of Florida granted the Respondents' motion to dismiss. Lambert appealed, but the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's decision, adopting the court's reasoning.

REASONS FOR DENYING THE PETITION

The District Court dismissed Lambert's five-count amended complaint against the Respondents on the grounds that Moore and Finklea were entitled to qualified immunity, MacMillan and Dietz were entitled to absolute immunity, and Lambert failed to state a claim upon which relief may be granted against Crist for supervisor liability. Lambert claims that the District Court's decision should be reversed because probable cause is not transferable from one seizure to another, the mistaken release of Lambert's vehicle "purged it of being tainted as forfeitable contraband," and the FCFA does not preempt 42 U.S.C. § 1983. Accordingly, the Respondents will address each argument in turn.

I. Probable Cause Existed to Seize Lambert's Vehicle.

Lambert contends that probable cause is not transferable from one seizure to another. Specifically, Lambert claims that by stopping and re-seizing her vehicle without a warrant, probable cause, or exigent circumstances, Moore violated her Fourth Amendment right to be free from unreasonable

searches and seizures. Additionally, Lambert claims that when Finklea advised Moore to stop Lambert's vehicle under the pretext of a traffic stop and re-seize her vehicle regardless of whether Moore had a warrant, probable cause, or exigent circumstances, Finklea violated Lambert's Fourth Amendment right to be free from unreasonable searches and seizures.

Despite Lambert's focus on the re-seizure of her vehicle, the Respondents emphasize that the *initial* seizure of the vehicle controls the analysis of this appeal. Only the circumstances concerning the initial seizure are relevant because it is those circumstances that formed the basis for Moore to re-seize the car under the FCFA. The re-seizure was premised on the same grounds as the first seizure and was necessary only because the vehicle was mistakenly released by the FHP impound yard. Thus, the re-seizure could be based on the same probable cause that existed for the initial seizure.

In *Florida v. White*, 526 U.S. 559, 566 (1999), the United States Supreme Court held that the Fourth Amendment did not require the police to obtain a warrant before seizing an automobile from a public place when they had probable cause to believe that it was contraband under Florida's forfeiture laws. The Supreme Court's holding was based in part on *Carroll v. United States*, 267 U.S. 132, 149 (1925), which held that when federal officers have probable cause to believe that a vehicle contains contraband, the Fourth Amendment does not require them to obtain a warrant prior to searching or seizing the vehicle. In support of its holding, the Supreme Court explained that, "like the early federal statutes that we looked to in *Carroll*, the Florida Contraband Forfeiture Act authorized the warrantless seizure of both goods subject to

duties and the ships upon which those goods were concealed." *White*, 526 U.S. at 565; *see also United States v. Valdes*, 876 F.2d 1554, 1557 (11th Cir. 1989) (property can be seized without a warrant); *State v. Pomerance*, 434 So. 2d 329, 330 (Fla. 2d DCA 1983) (a warrant is not required under the FCFA to seize a vehicle).

Based on *White*, *Carroll*, *Valdes*, and *Pomerance*, Moore did not need a court order, warrant, or exigent circumstances to seize Lambert's vehicle lawfully, as long as he had probable cause to believe that it was contraband under the FCFA.[3] Although Lambert's vehicle was released on January 3, 2005, Lambert concedes that Moore told her at the time he took back her vehicle that the release was a mistake.[4] While Lambert claims there is no evidence that the impound yard was required to "hold" the vehicle, and that Lambert was not violating any traffic laws on January 12, 2005 when Moore re-seized the vehicle, these issues are irrelevant because the FCFA expressly authorizes personal property to be seized subsequent to the violation. *See* FLA. STAT. § 932.703(2)(a). In other words, Moore had the authority to re-seize Lambert's vehicle because he had probable cause to believe that the vehicle was used on January 2, 2005 in violation of the FCFA.

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[3] Moore also had express authority to seize Lambert's car the first time because D.U.I. is one of the enumerated offenses that subjects personal property to forfeiture. *See* FLA. STAT. § 932.703(2)(a).

[4] Lambert does not dispute the fact that the FHP impound yard mistakenly released the vehicle, nor does she allege that the release was not a mistake.

Lambert exercised her right to a preliminary hearing to challenge the seizure of her vehicle as forfeitable contraband under the FCFA. At the preliminary hearing, the FHP bore the initial burden of showing probable cause for the seizure. FLA. STAT. § 932.703(2)(a). In *In re Forfeiture of One Hundred Seventy-One Thousand Nine Hundred Dollars*, 711 So. 2d 1269, 1274 n.8 (Fla. 3d DCA 1998), the court held that the standard of probable cause to support forfeiture is less rigorous than the standard required to prove criminal conduct. Under the FCFA, probable cause requires only a showing of a "sufficient probability to warrant a reasonable belief" that the property was used in violation of the FCFA. *In re Forfeiture of One Hundred Seventy-One Thousand Nine Hundred Dollars*, 711 So. 2d 1269, 1274 n.8 (Fla. 3d DCA 1998); *In re Forfeiture of Forty-Seven Video Redemption Games*, 799 So. 2d 221, 222 (Fla. 2d DCA 2001). Probable cause requires more than mere suspicion, but less than *prima facie* proof, and it can be established through circumstantial evidence. *In re Forfeiture of One Hundred Seventy-One Thousand Nine Hundred Dollars*, 711 So. 2d 1269, 1274 n.8 (Fla. 3d DCA 1998).

Moore did not need actual knowledge of a violation of the FCFA to seize Lambert's vehicle on January 2, 2005; constructive knowledge was sufficient. *City of Daytona Beach v. Bush*, 742 So. 2d 335, 337 (Fla. 5th DCA 1999); *In re Forfeiture of 1987 Chevrolet*, 605 So. 2d 1322, 1323 (Fla. 1st DCA 1992). At the time Moore seized Lambert's vehicle, the circumstances known to him were sufficient for him to have a reasonable belief that the vehicle was being used in violation of the FCFA. Specifically, Gaudreau, Lambert's brother, told Moore only that he was "staying with Lambert and just took the car," and not that Lambert had no knowledge that he may use her vehicle or use it in violation

of the FCFA. Furthermore, Gaudreau was under the influence of alcohol at the time he made the statement, and for that reason alone Moore was under no obligation to believe him. As a law enforcement officer, Moore had the discretion to conclude that because Gaudreau was living with his sister at the time he drove her vehicle while under the influence of alcohol, there was a sufficient probability to warrant a reasonable belief that the vehicle was used in violation of the FCFA. Therefore, the vehicle was subject to immediate seizure without a warrant. *See* FLA. STAT. § 932.701(2)(a)(9) (driving under the influence of alcohol or drugs subjects a vehicle to seizure); *Florida v. White*, 526 U.S. 559, 565 (1999). Accordingly, Moore had probable cause to seize Lambert's vehicle under the FCFA, and Finklea's advice to Moore to re-seize Lambert's vehicle accorded with the FCFA because Moore had probable cause to seize the vehicle.

Lambert also contends that section 932.703(2)(a) of the Florida Statutes, which provides that "[p]ersonal property may be seized ... subsequent to the violation ..." did not provide Moore with the authority to re-seize Lambert's vehicle. She claims that this provision was intended to apply to situations where property could not be immediately seized at the time probable cause was established because the property could not be located, was transferred or sold to a third party, was outside the jurisdiction of the court, had substantially diminished in value, or had been co-mingled with any property which could not be easily divided. *See* FLA. STAT. § 932.703(5). In support of her argument, Lambert relies on section 932.703(5) of the Florida Statutes and Justice Stevens' dissenting opinion in *Florida v. White*, 526 U.S. 559, 571 (1999).

However, section 932.703(5) does not apply to Lambert's situation because this provision makes no mention of section 932.703(2)(a), and, instead, it requires only that the court "order the forfeiture of *any other property* of a claimant . . . if any of the property described in this section . . . (a) Cannot be located; (b) Has been transferred to, sold to, or deposited with a third party; (c) Has been placed beyond the jurisdiction of the court; (d) Has been substantially diminished in value by any act or omission of the person in possession of the property; or (e) Has been commingled with any property which cannot be divided without difficulty." (Emphasis added). Essentially, section 932.703(5) applies only to situations where an individual has in some way interfered with the ability of law enforcement to seize contraband. In that situation, section 932.703(5) requires the court to order the forfeiture of some other property owned by that individual, even though such property is not necessarily contraband.

Furthermore, Justice Stevens' dissenting opinion in *Florida v. White* that "a belated seizure may involve a serious intrusion on the rights of innocent persons" is neither persuasive nor controlling authority with respect to whether section 932.703(2)(a) authorized the re-seizure of Lambert's vehicle. *See* 526 U.S. 559, 571 (1999). To the contrary, in *Florida v. White*, the United States Supreme Court held that where police had developed probable cause to believe that a defendant's vehicle was subject to forfeiture under the FCFA *several months* prior to seizing the vehicle, the police were not required to obtain a warrant to effectuate the seizure under the FCFA. *See id.* at 561-62.

Lambert also contends that section 932.703(2)(a) of the Florida Statutes is ambiguous at best and should be strictly

construed against any loss and in favor of the owner's retention of property. While this rule of construction may apply in the context of forfeiture proceedings, it is irrelevant in the context of holding public officials liable for the alleged violation of Lambert's constitutional rights because to hold these officials liable, Lambert must prove that they violated a clearly established constitutional or statutory right, not a right which is "ambiguous." *See Rodgers v. Horsley*, 39 F.3d 308, 310-11 (11th Cir. 1994) (for a "right" to be clearly established, a plaintiff must identify pre-existing case law with "materially similar" facts which would make it "apparent" to the officials in this case that their actions were unlawful).

Lambert also contends that section 932.704(1) of the Florida Statutes prohibited Moore and Finklea from re-seizing her vehicle under a false pretext. In relevant part, section 932.704(1) provides that

> "[i]t is also the policy of this state that law enforcement agencies ensure that, in all seizures made under the Florida Contraband Forfeiture Act, their officers adhere to federal and state constitutional limitations regarding an individual's right to be free from unreasonable searches and seizures, including, but not limited to, the illegal use of stops based on pretext . . ."

Because FHP officials have observed the federal or state constitutional limitations regarding Lambert's Fourth Amendment rights, and because Moore did not re-seize Lambert's vehicle under a false pretext, but rather because he had probable cause to believe that it was subject to forfeiture, the Respondents fully complied with section 932.704(1).

Lambert also contends that the FHP impound yard's act of mistakenly releasing her vehicle "interrupted" the seizure, and therefore the re-seizure of the vehicle on January 12, 2005 constituted a "separate" seizure requiring a warrant supported by probable cause. However, Lambert does not rely upon case law concerning forfeiture actions or the FCFA to support her argument. Instead, she relies upon *United States v. Silverstri*, 787 F.2d 736, 740 (1st Cir. 1986), in which the First Circuit held that when a warrant arrives subsequent to illegal seizure of items previously observed, it does not effect legal seizure of those items because they cannot be legally seized unless police relinquish control of them, thereby establishing an independent basis for the re-seizure. *Silverstri* is inapposite to this case because Moore clearly had probable cause to seize Lambert's vehicle because it was subject to forfeiture under the FCFA, the seizure could be effectuated without a warrant, and the return of the vehicle was unintended.

Lambert argues at length that because the re-seizure was "separate," the FHP needed a warrant supported by sufficient probable cause based on "*new* or *different* facts from those supporting the initial seizure." Again, the cases Lambert cites do not involve civil forfeiture proceedings or the FCFA. *See Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971) ("[t]he rule that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well delineated exceptions,' is not so frail that its continuing vitality depends on the fate of a supposed doctrine of warrantless arrest"); *United States v. Fuller*, 374 F.3d 617, 621-22 (8th Cir. 2004) (discussing the limited Fourth Amendment rights of a vehicle owner who has entrusted his vehicle to another); *United States v.*

Magluta, 418 F.3d 1166, 1182 (11th Cir. 2005) (holding that district court did not err in determining that law enforcement officers had probable cause to search the contents of the rental car of an associate of the defendant); *Murray v. United States*, 487 U.S. 533, 535, 543-44 (1988) (holding that to determine whether marijuana observed in plain view at time of unlawful entry and later seized during subsequent search pursuant to warrant was admissible under the independent source doctrine, the court on remand was required to determine whether government agents would have sought a warrant if they had not earlier entered the warehouse). Furthermore, Lambert's argument is flawed because she appears to be applying the "independent source doctrine," a doctrine inapplicable to the instant case because it did not involve a situation where the initial seizure of Lambert's vehicle was illegal and then FHP sought to re-seize her vehicle legally because it had discovered that the vehicle was contraband through an "independent source." *See Murray v. United States*, 487 U.S. 533, 538-39 ("[i]n the classic independent source situation, information which is received through an illegal source is considered to be cleanly obtained when it arrives through an independent source") (internal quotations and citations omitted). Rather, *Florida v. White*, as discussed *supra*, states the applicable standard in the instant case and clearly provides that a warrant was not required because there was probable cause to believe that Lambert's vehicle was subject to civil forfeiture.

Finally, Lambert contends that the probable cause to seize her vehicle initially was not transferable to the re-seizure of her vehicle. In support of her argument, Lambert cites several decisions which stand for the proposition that a search or seizure of a person must be supported by probable cause

particularized to that person. *See Ybarra v. Illinois*, 444 U.S. 85, 91 (1979)

> "Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be."

United States ex rel. Cabrera v. Page, 172 F. Supp. 2d 966, 979 (N.D. Ill. 2001) ("It was also established that probable cause is not transferred by association – that simply being in the company of a person suspected of crime is not probable cause to search or arrest."), *rev'd*, 324 F.3d 527 (7th Cir. 2003); *United States v. Rivers*, 121 F.3d 1043, 1045 (7th Cir. 1997) ("the court must keep in mind that 'a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person'"); *Swint v. City of Wadley, Alabama*, 5 F.3d 1435, 1444 (11th Cir. 1993) ("Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person."), *vacated*, 51 F.3d 988 (11th Cir. 1995). The cases Lambert cites do not support her proposition that "probable cause to seize should not be transferable from one seizure to another" in the context of a civil forfeiture action. Unlike this case, which involved probable cause particularized to Lambert's vehicle, the cases Lambert cites contemplate situations where an individual is subjected to a search or seizure only because he or she is associated with others who are involved in criminal activity. While Lambert

relies heavily upon dissenting opinions and cases which do not apply to civil forfeiture actions, she does not cite to any factually similar or relevant case to support her contention that the FHP needed a warrant supported by sufficient probable cause based on new or different facts from those supporting the initial seizure to re-seize her vehicle. For this reason alone, the Respondents are entitled to qualified immunity.

II. The Mistaken Release of Lambert's Vehicle Did Not "Purge It of Being Tainted as Forfeitable Contraband."

Relying upon *Murray*, *Silvestri*, and *White v. Florida*,[5] Lambert claims that the FHP impound yard's act of mistakenly releasing her vehicle on January 3, 2005 "purged it of being tainted as forfeitable contraband" because the act of releasing the vehicle interrupted the initial seizure. Therefore, Lambert claims that the re-seizure of the vehicle was a new, separate seizure which required Moore to have a warrant with probable cause based on new or different facts from those supporting the initial seizure. As discussed supra, *Murray* and *Silverstri* are inapposite to this case. Furthermore, Lambert's reliance on *White v. Florida*, which was reversed by the United States Supreme Court, does not demonstrate that Moore violated any of Lambert's constitutional rights by re-seizing her vehicle. Rather, section 932.703(2)(a) of the Florida Statutes and the United States Supreme Court's decision in *Florida v. White* clearly authorized Moore to seize Lambert's vehicle without a

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[5] *White v. Florida*, 753 So. 2d 548 (Fla. 1999) was later reversed by the United States Supreme Court in *Florida v. White*, 526 U.S 559 (1999).

warrant because he had reasonable cause to believe that her vehicle was still subject to forfeiture.

Lambert also contends that if her vehicle was still considered forfeitable contraband at the time Moore re-seized it on January 12, 2005, then her car could be released by mistake an unlimited number of times and re-seized each time at the "whim of law enforcement." Lambert claims that this situation would be substantially similar to an "open-ended" or "general search warrant" prohibited by the United States Supreme Court.

Lambert's argument that her car could be released mistakenly an unlimited number of times and re-seized at the discretion of law enforcement fails because her vehicle would not be subject to unlimited seizures at the whim of law enforcement. Instead, her vehicle would be subject to seizure only until it was determined in the forfeiture proceedings whether probable cause existed to seize her vehicle initially. If no probable cause was found, her vehicle would be released and would not be subjected to re-seizure on the same set of facts which caused the vehicle to be seized initially.

III. The FCFA Provided Lambert with a Sufficient Post-Deprivation Remedy so as Not to Violate Her Fourth Amendment and Due Process Rights Under the Constitution.

Lambert contends that the District Court erred in finding that Lambert's Fourth Amendment and due process rights were not violated because the FCFA provided her with a sufficient post-deprivation remedy. Lambert bases this

contention on the fact that the FCFA proceedings in her case focused on the initial rather than the re-seizure of her vehicle.[6]

Lambert's due process rights were not violated when Moore seized her vehicle pursuant to the FCFA because Lambert exercised her right to a preliminary hearing to challenge the seizure of her vehicle as forfeitable contraband. In *Department of Law Enforcement v. Real Property*, 588 So. 2d 957, 959 (Fla. 1991), the Florida Supreme Court held that the FCFA comports with substantive and procedural due process under the Florida Constitution. The Court also held that due process requires notice of any seizure or forfeiture be given to the property owner, along with notice of the right to contest a seizure by requesting an adversarial preliminary hearing. The Court also noted that the procedures in place for litigating forfeiture actions are contained within the FCFA, which the court found to be constitutional. Furthermore, federal due process, which does not provide for any greater protection than that provided by the Florida Constitution, is not violated when a party has a meaningful post-deprivation remedy available. *Lindsey v. Storey*, 936 F.2d 554, 561 (11th Cir. 1991) ("[e]ven assuming the continued retention of plaintiff's personal property is wrongful, no procedural due process violation has occurred 'if a meaningful postdeprivation remedy for the loss is available' ").

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[6] It is unclear how Lambert can argue that the forfeiture proceedings focused on the initial seizure and not the re-seizure of her vehicle because she conceded in her Amended Complaint that there was testimony regarding the re-seizure during the forfeiture proceedings. Presumably, because the court was aware of both the initial seizure and the re-seizure, the court's finding that Lambert was entitled to the "innocent owner defense" and its order to return Lambert's vehicle were done with the knowledge that the vehicle at issue was in the FHP's possession as a result of the re-seizure, not the initial seizure.

Here, Lambert concedes that Moore gave her a notice of seizure when he took back her vehicle on January 12, 2005. The notice advised her of her right to a preliminary hearing. Lambert also concedes that she successfully utilized the post-deprivation procedures set forth in the FCFA. She prevailed at the preliminary hearing, prevailed on appeal, received her vehicle back, and received an award of attorney's fees and costs. Therefore, Lambert had her "day in court." She cannot maintain an action for denial of procedural due process because she was provided with all of the due process that was required by law.

Accordingly, because the Respondents did not violate Lambert's Fourth Amendment rights and due process rights, the Eleventh Circuit's affirmance of the District Court's decision to dismiss Lambert's claims under 42 U.S.C. § 1983 should be affirmed.

A. *MacMillan and Dietz are Entitled to Absolute Immunity.*

Under the heading, "FCFA does not preempt 42 U.S.C. § 1983," Lambert attempts to argue that MacMillan and Dietz were not entitled to absolute immunity for their "tacit collaboration in the re-seizure" of Lambert's vehicle. Instead, Lambert claims they were entitled only to qualified immunity, which "could be overcome by showing their conduct violated clearly-established statutory or Constitutional rights of which a reasonable person would have known." However, MacMillan and Dietz are entitled to absolute immunity for the following reasons.

A prosecutor receives absolute immunity for acts "that are connected with the prosecutor's role in judicial

proceedings." *Burns v. Reed*, 500 U.S. 478, 494 (1991). Absolute immunity applies in the same fashion to non-prosecuting attorneys who perform functions analogous to a prosecutor, including those attorneys who decide to move forward with an administrative proceeding. *Butz v. Economou*, 438 U.S. 478, 515 (1978). Many different acts can entitle a prosecutor to absolute immunity. For example, absolute immunity applies to the initiation and pursuit of a prosecution, court appearances, in-court activity, preparation and filing of charging documents, and determinations that evidence demonstrates probable cause.[7] Moreover, absolute immunity applies in the context of non-criminal proceedings, including forfeiture proceedings.[8]

Lambert tries to avoid absolute immunity by alleging that MacMillan's and Dietz's refusal to release her vehicle constituted a "tacit collaboration" in the vehicle's re-seizure. However, the law is clear that MacMillan and Dietz were not obligated to return Lambert's vehicle while the forfeiture proceedings were pending. *See* FLA. STAT. § 932.703(1)(c) ("[a]ll rights to, interest in, and title to contraband articles

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[7] *See, e.g., Kalina v. Fletcher*, 522 U.S. 118, 120, 129 (1997); *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993); *Rowe v. Fort Lauderdale*, 279 F.3d 1271, 1279 (11th Cir. 2002); *Baez v. Hennessy*, 853 F.2d 73, 75 (2d Cir. 1988).

[8] *See, e.g., Smith v. Power*, 346 F.3d 740 (7th Cir. 2003) (absolute immunity for alleged retaliatory initiation of civil proceedings); *Cooper v. Parrish*, 203 F.3d 937 (6th Cir. 2000) (absolute immunity for preparing and filing public nuisance and civil forfeiture complaints); *Reitz v. County of Bucks*, 125 F.3d 139 (3d Cir. 1997) (absolute immunity for attorney who handled civil forfeitures); *Ehrlich v. Giuliani*, 910 F.2d 1220 (4th Cir. 1990) (absolute immunity for forfeiture proceedings, even if prosecutor inadvertently injures an innocent person).

used in violation of [§] 932.702 shall immediately vest in the seizing law enforcement agency upon seizure"). Contrary to Lambert's claims, neither the court, nor MacMillan, nor Dietz, had the jurisdiction to demand that Lambert's vehicle be returned to her while the forfeiture action was still pending. *See City of Coral Gables v. Valdes*, 582 So. 2d 148 (Fla. 3d DCA 1991) (trial court lacked jurisdiction to order the return of a vehicle that was seized less than ninety days before initiation of forfeiture proceedings); *McLane v. Youngblood*, 544 So. 2d 1179 (Fla. 2d DCA 1989) (owner denied possession of automobile during pendency of forfeiture proceedings). However, when the Second District Court of Appeal affirmed the circuit court's order directing the release of Lambert's vehicle, the litigation ended and the Respondents returned Lambert's vehicle and paid her attorney's fees and costs. Accordingly, MacMillan and Dietz are entitled to absolute immunity for their roles in prosecuting the forfeiture proceedings concerning Lambert's vehicle.

B. *Lambert Failed to State a Claim upon which Relief may be Granted for Supervisor Liability Against Crist.*

Under the heading, "FCFA does not preempt 42 U.S.C. § 1983," Lambert also attempts to argue that she has stated a claim upon which relief may be granted against Crist for "deliberate indifference" for failing to intervene after learning that a subordinate had violated her civil rights.

To allege supervisory liability via deliberate indifference, a plaintiff must allege that federal or state law imposed a duty on the supervisor to intervene, the supervisor had actual or constructive notice of unconstitutional practices carried out by his subordinates which triggered his duty to intervene,

yet deliberately failed to take such action, and that the supervisor's breach of duty was the proximate cause of the plaintiff's injury. *See Murphy v. New York Racing Association, Inc.*, 76 F. Supp. 2d 489, 500 (S.D.N.Y. 1999); *Brown v. Crawford*, 906 F.2d 667, 671 (11th Cir. 1990) ("Supervisory liability occurs either when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between actions of the supervising official and the alleged constitutional deprivation."); *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir. 1992) ("The supervisors must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of that they might see. They must in other words act either knowingly or with deliberate, reckless indifference.").

Deliberate indifference is a stringent standard of fault which requires proof that an official disregarded a known or obvious consequence of his or her action. *Estate of Davis v. City of North Richland Hills*, 406 F.3d 375, 381 (5th Cir. 2005). For an official to have acted with deliberate indifference, the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he or she must also draw the inference. *Id.* Deliberate indifference requires a showing of more than negligence or even gross negligence. *Id.* Actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference and do not divest officials of qualified immunity. *Id.*

Lambert failed to allege that any federal or state law imposed a duty on Crist to intervene in the forfeiture action by directing the return of Lambert's vehicle while the

forfeiture action was still pending in state court. To the contrary, Lambert's vehicle became vested in the FHP upon seizure, so Lambert's only avenue of relief was through the procedures set forth in the FCFA. *See* FLA. STAT. § 932.703(1)(c); *Morton v. Gardner*, 513 So. 2d 725, 728 (Fla. 3d DCA 1987).

Furthermore, Lambert failed to allege that Crist had any involvement in or knowledge of the FHP's decision to seize Lambert's vehicle, or the forfeiture proceedings, until after the forfeiture proceedings had commenced and the matter was appealed. Nor did Lambert allege that Crist had any knowledge that Finklea, MacMillan, or Dietz were engaging in unconstitutional conduct, yet through deliberate indifference failed to intervene. While Crist, as the former Attorney General, was ultimately in charge of the Attorney General's Office, Lambert never alleged that he personally supervised the other Respondents. At best, Crist may have had knowledge that his office was advocating on behalf of the FHP in a judicial proceeding that concerned the forfeiture of a vehicle under the FCFA.

Accordingly, Lambert failed to state a claim for which relief could be granted against Crist for supervisory liability, via deliberate indifference, under 42 U.S.C. § 1983. *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir. 1992).

CONCLUSION

The District Court and the Eleventh Circuit Court of Appeals did not err in dismissing Lambert's claims against the Respondents. Moore and Finklea are entitled to qualified immunity, MacMillan and Dietz are entitled to absolute immunity, and Lambert has failed to state a claim upon which relief may be granted against Crist for supervisor liability. Furthermore, probable cause existed to seize Lambert's vehicle, the FHP impound yard's act of mistakenly releasing the vehicle did not mean that the vehicle was no longer forfeitable contraband, and re-seizing the vehicle did not require a warrant supported by probable cause based on new or different facts. Finally, the preliminary hearing provided to Lambert under the FCFA constituted a sufficient post-deprivation remedy, so Lambert's Fourth Amendment and Due Process rights were not violated.

Wherefore, Respondents request that this court deny the Petitioner's Writ of Certiorari.

Respectfully submitted,

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